New Sources of Water for Energy Development and Growth: Interbasin Transfers: A Short Course (Summer Conference, June 7-10) 1982

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A Downstream Perspective on South Dakota's Purported Sale of Water to ETSI

Norman W. Thorson

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A DOWNSTREAM PERSPECTIVE ON SOUTH DAKOTA'S PURPORTED SALE OF WATER TO ETSI

Norman W. Thorson
Professor of Law
University of Nebraska

June 8, 1982

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I. Existing and Potential Uses of Missouri Basin Water
   A. In-Basin Uses
   B. Out-of-Basin Uses

II. The Proposed ETSI Diversion
   A. Quantity of Water (up to 50,000 acre-feet per year)
   B. Economic Impact ($9,000,000 annual windfall to S. Dak.)

III. Positions of the Missouri Basin States
   A. Defenders of Upstream Diversions
      1. Montana
      2. North Dakota
      3. South Dakota
      4. Wyoming

   B. Defenders of Downstream Flows
      1. Iowa
      2. Missouri
      3. Nebraska

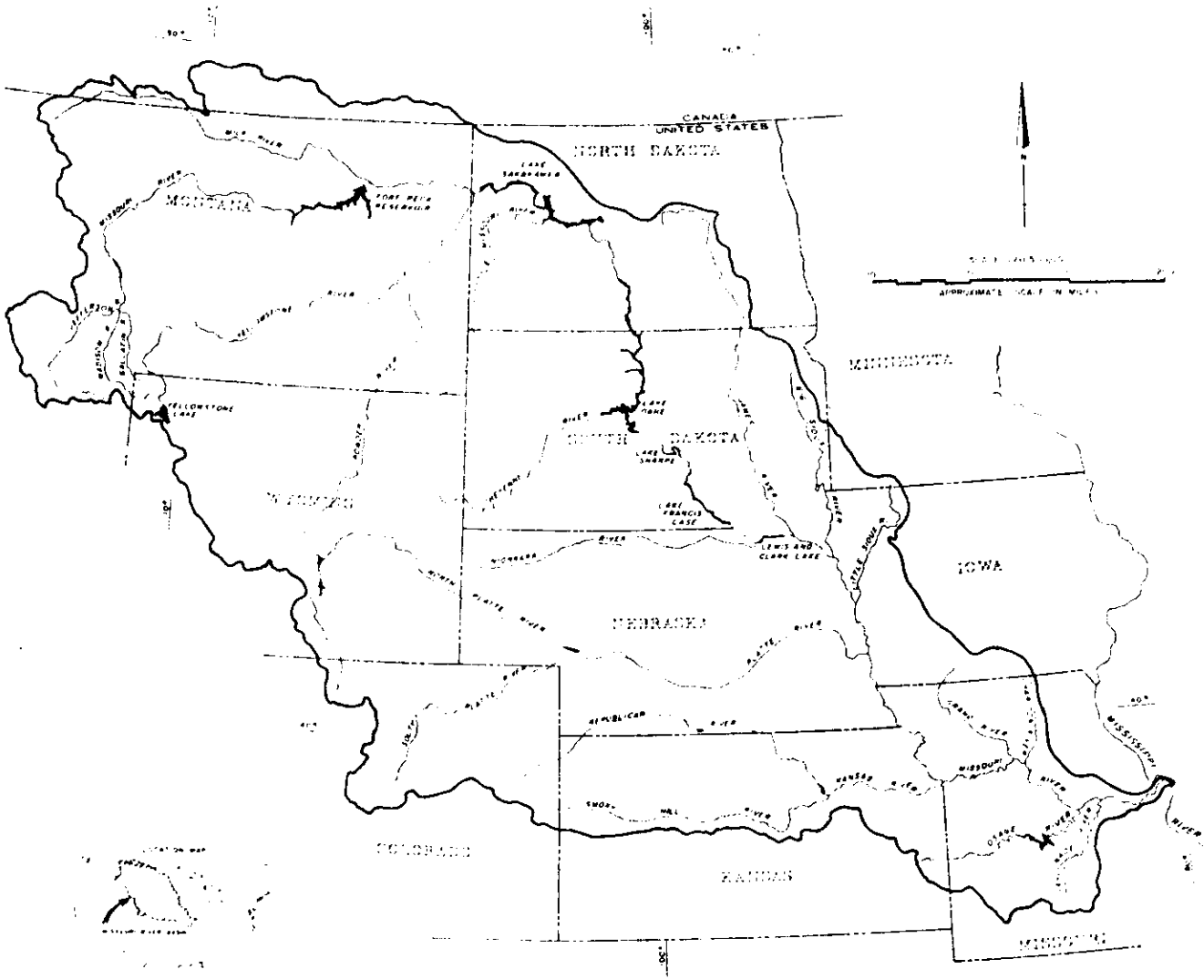
   C. Currently Neutral
      1. Colorado
      2. Kansas
      3. Minnesota

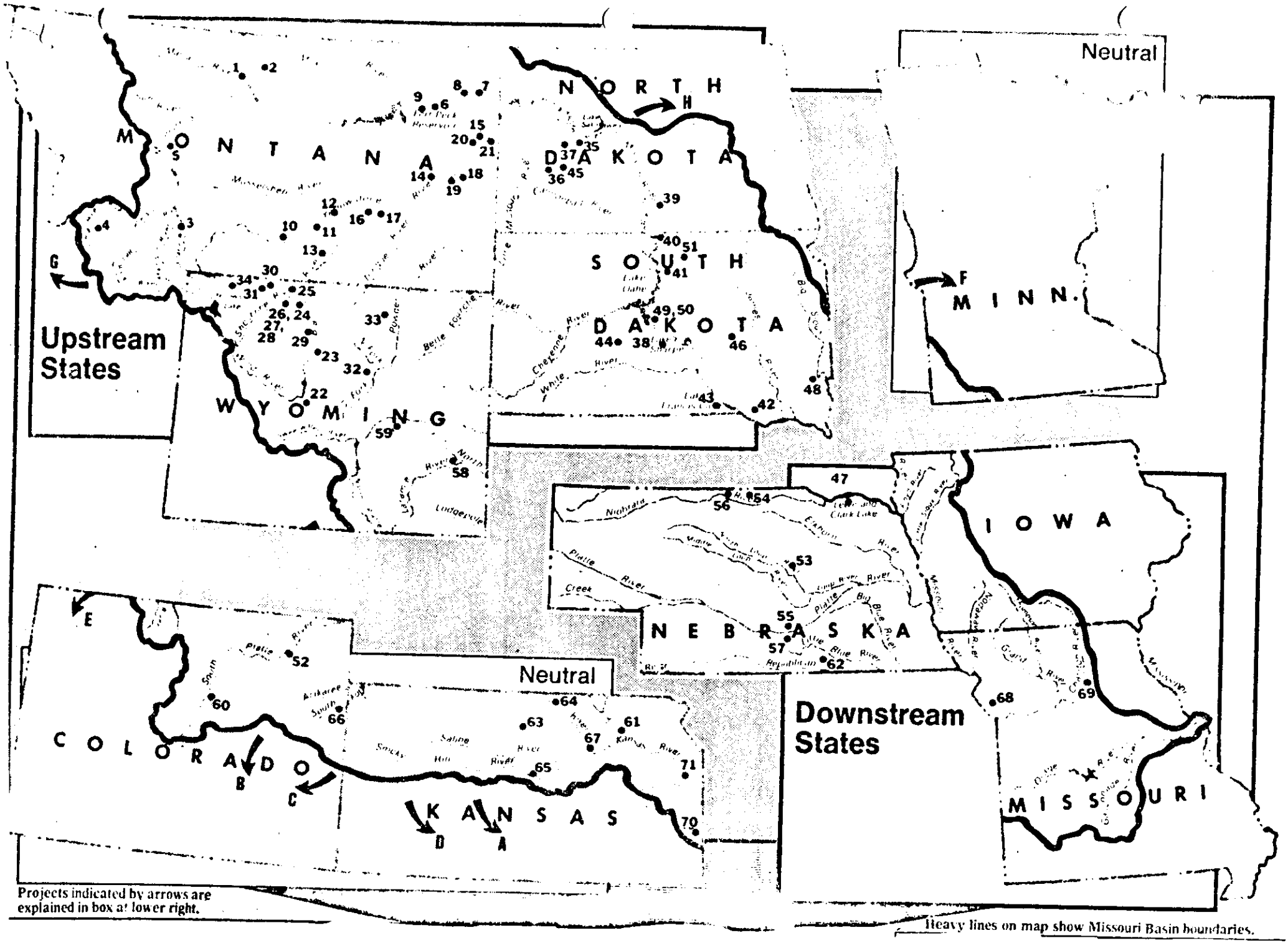
IV. Flood Control Act of 1944 (58 Stat. 887)
   A. Pick-Sloan Compromise
   B. O'Mahoney-Millikin Amendment

V. Possible "Solutions"
   A. Legal
      1. Downstream Arguments
      2. Upstream Defenses

   B. Political
      1. Interstate Compact
      2. Intergovernmental Authority
      3. Congressional Legislation

MISSOURI RIVER BASIN




Neutral
MONTANA
NORTH DAKOTA
SOUTH DAKOTA
MINN.
F
G
Upstream States
WYOMING
NEBRASKA
IOWA
Neutral
COLORADO
B
C
E
KANSAS
D
A
Downstream States
MISSOURI
Projects indicated by arrows are explained in box at lower right.
Heavy lines on map show Missouri Basin boundaries.

Proposed Water Withdrawals for Uses Within the Missouri Basin

Project	Water Source Primary Use

Upstream States

Montana

Project	Water Source Primary Use
1. Lower Marias Unit	Marias River Agriculture
2. Milk River Supplemental	Milk River Agriculture
3. Gallatin Unit	Gallatin River Agriculture
4. Big Hole	Big Hole River Agriculture and in-stream use
5. Chestnut Valley Unit	Missouri River Agriculture
6. Fort Charles Unit	Missouri River Agriculture
7. Calais Unit	Missouri River Agriculture
8. Poplar Unit	Missouri River Agriculture
9. Wapiti Unit	Missouri River Agriculture
10. White Horse Bench Unit	Clarks Fork of Yellowstone River Agriculture
11. Huntley South Unit	Yellowstone River Agriculture
12. Seven Mile-Sitting Bull Unit	Yellowstone River Agriculture
13. Hardin Unit	Bighorn River Agriculture
14. Conns Coulee Unit	Yellowstone River Agriculture
15. Fox Creek South Unit	Yellowstone River Agriculture
16. Hay Creek Unit	Yellowstone River Agriculture
17. Forsyth Unit	Yellowstone River Agriculture
18. Fallon Bench Unit	Yellowstone River Agriculture
19. Broadview Bench Unit	Yellowstone River Agriculture
20. War Dance Unit	Yellowstone River Agriculture
21. Seven Sisters Unit	Yellowstone River Agriculture

Wyoming

Project	Water Source Primary Use
22. Kirby Draw Project	Bighorn River Agriculture
23. Banjo Flats Project	Bighorn River Agriculture
24. Greybull Flats Unit	Bighorn River Agriculture
25. Polecat Bench	Shoshone River Agriculture
26. Shoshone Extension Unit South	Shoshone River Agriculture
27. McCullough Section	Shoshone River Agriculture
28. Sage Section	Shoshone River Agriculture
29. Westside Irrigation Project	Bighorn River or Boysen Reservoir Agriculture
30. Badger Basin Unit	Clarks Fork of Yellowstone River Agriculture
31. Clarks Fork Offstream Storage	Clarks Fork of Yellowstone River Agriculture
32. Kaycee Project	Powder River Agriculture, municipal and industrial
33. Buffalo Project	Clear Creek on Powder River Municipal
34. Cadiz Project	Clarks Fork River
58. Corn Creek Irrigation Project	Grayrocks Reservoir and Glendo Reservoir Agriculture
59. Glenrocks/Deer Creek Project	Deer Creek (North Platte River) Municipal

North Dakota

Project	Water Source Primary Use
35. Great Plains Gasification Project	Lake Sakakawea Energy
36. Southwest Area Water Supply	Lake Sakakawea Municipal and industrial
37. Nokota Methanol Plant	Lake Sakakawea Energy
39. Apple Creek Unit	Apple Creek Agriculture, municipal and industrial
45. Versippi Unit	Green River Municipal and industrial

South Dakota

Project	Water Source Primary Use
38. Grass Rope Unit	Missouri River Agriculture
40. Pollock-Herreid Unit	Missouri River and Spring Creek Agriculture, municipal and industrial
41. Oahe Riverside Irrigation	Oahe Reservoir Agriculture
42. Lower James-Ft. Randall Water Diversion	Missouri River and James River Agriculture
43. Gregory County Water Supply	Lake Francis Case Agriculture, municipal and industrial
44. Western Dakota's Water Resources Management Plan	Missouri River Municipal and industrial
46. Eastern South Dakota and Upper Big Sioux River	Missouri River Municipal and industrial
48. Sioux Falls Unit	Big Sioux River and Slipup Creek Municipal and industrial
49. Oahe Unit	Missouri River Agriculture, municipal and industrial
50. CENDAK	Oahe Reservoir Agriculture, municipal and industrial
51. WEB Pipeline	Oahe Reservoir Municipal and industrial

Downstream States

Nebraska

Project	Water Source Primary Use
47. Crofton Unit	Missouri River Agriculture, municipal and industrial
53. North Loup Division	Calamus and North Loup Rivers Agriculture
54. O'Neill Unit	Niobrara River Agriculture
55. Prairie Bend Unit	Platte River Agriculture
56. Sparks Unit	Niobrara River Agriculture
57. Little Blue Water Resources Project	Platte River Agriculture
62. Little Blue Unit	Little Blue River Agriculture

Missouri

Project	Water Source Primary Use
68. Smithville Lake	Little Platte River Municipal and industrial
69. Long Branch Lake	East Fork Little Chariton River Municipal and industrial

Iowa

No proposed water withdrawal projects.

Source: Missouri Basin States Association

Project	Water Source Primary Use

Neutrals

Kansas

61. Onaga Lake ..... Vermillion Creek
Municipal and industrial

63. Glen Elder Unit ..... Solomon River
Agriculture, municipal and industrial

64. Scandia Unit ..... Republican River
Agriculture, municipal and industrial

65. Kanopolis Unit ..... Smoky Hill River
Municipal and industrial

67. Milford Lake ..... Republican River
Municipal and industrial

70. Fort Scott Lake ..... Marmaton River
Municipal and industrial

71. Hillsdale Lake ..... Big Bull Creek
Municipal and industrial

Colorado

52. Narrows Unit ..... South Platte River
Agriculture

60. Foothills Municipal
Water Treatment Project ..... South Platte River
Municipal and industrial

66. Bonny Reservoir ..... South Fork Republican River
Fish, wildlife and recreation

Minnesota

No proposed water withdrawal projects.

Proposed Water Withdrawals From the Missouri River Basin

Project	Water Source Ultimate Use

A. ETSI Coal Slurry
Pipeline/Wyoming ..... Madison Formation in Wyoming
or Oahe Reservoir in South Dakota.
Slurry coal to Oklahoma,
Arkansas and Louisiana.

B. High Plains Diversion ..... Lake Francis Case
in South Dakota.
Agriculture, municipal and industrial
in Kansas, Colorado, Nebraska,
Oklahoma, New Mexico and Texas.

C. High Plains Diversion ..... Missouri River
near St. Joseph, Missouri.
Agriculture, municipal and industrial
in Kansas, Colorado, Nebraska,
Oklahoma, New Mexico and Texas.

D. Texas Eastern
Coal Slurry Pipeline/Wyoming ..... Oahe Reservoir
in South Dakota.
Slurry coal to Texas.

E. Exxon Pipeline/South Dakota ..... Oahe Reservoir
in South Dakota.
Coal development
in Wyoming and Montana
and oil shale development
in Colorado and Utah.

F. Powder River Pipeline Inc.,
Wyoming and Montana ..... Missouri River
in South Dakota.
Slurry coal to Great Lakes area.

G. Sheridan Little Bighorn Group,
Wyoming and Montana ..... Little Bighorn River
in Wyoming and Montana.
Slurry coal to foreign coal markets
through West Coast ports.

H. Garrison Diversion Unit,
Initial Stage,
North Dakota ..... Garrison Reservoir
in North Dakota.
Agriculture, municipal and industrial
in North Dakota.

Iowa's position on interstate cooperation in the use and control of Missouri River Water

The following is intended to be used as a framework for presenting the state of Iowa's position on interstate cooperation in the use and control of Missouri River water. It has been specifically prepared for presentation and discussion at the May, 1982 meeting of the Missouri Basin States Association Board of Directors. The MBSA can serve as the appropriate forum by the member states for the preliminary discussions which will hopefully lead to an agreement among the states calling for interstate cooperation in the use and control of Missouri River water.

WHY IS THE SUBJECT OF WATER ALLOCATION AN ISSUE?

Throughout the river basin, natural and man-made systems depend on water from the river. Demand for use of the water is increasing both for in-basin use and for transfer out-of-basin. Such contemplated out of the basin diversions total from 8 to 10 million acre feet annually in the upstream states. The state of South Dakota alone has future use permits either granted or pending before its Water Management Board for approximately 5.6 million A-F. The average annual flow at Sioux City is only 21 million A-F. Out-of-basin diversions mean less water downstream and changes in the systems that depend on the water. The extent of those changes and the consequent losses they cause has not been adequately evaluated. Allowing diversion projects to continue absent adequate study and reasoned analysis of alternatives could be very costly.

This situation is particularly critical as it relates to the federal agencies as long as the decision-making process continues to slight downstream impacts and as long as significant, legitimate user groups, i.e. fish, wildlife and outdoor recreation and the public values associated with them are absent from the officially-recognized purposes in Missouri River management decisions.

WHAT IS THE ULTIMATE GOAL IN EXAMINING THE ISSUE OF WATER ALLOCATION?

What is needed, before the water is over committed, is better knowledge of the effects of various levels of water on the full range of systems which nature and people have built around the river's water supply, and a decision-making or allocation process that takes this knowledge into account.

The long range objective is an allocation policy or process that fulfills the congressional intent of preserving the interests and needs of existing uses within the Missouri

River basin states and maximizes the benefits to all interests within these states. One alternative is to promote an interstate compact to allocate water with this long range objective as the decision criteria. Another alternative is to promote an interstate, intergovernmental authority with power to allocate water and compensate water losers. All basin states representing all legitimate user groups within each state must be included in the allocation decision-making process.

Any allocation policy or process should consider regional development, distribution of costs and benefits, environmental quality and economic efficiency as important factors. Adherence to the specific projects contained within the Pick-Sloan Plan need not be a constraint. The outcome of a policy or process should be allocations of quantity, quality, time of use and location of use.

WHAT IS THE LOGICAL FIRST STEP IN RESOLVING THE ISSUE?

The short term objective should be to halt out-of-basin transfers, withdrawals or diversions. The states of the basin should work together to analyze the effects of various levels of water on the systems which nature and people have built around the river's water supply.

Working together, the states should develop an agreement that all the basin states would participate in decisions allowing out-of-basin transfers. The states should set a deadline of December 31, 1984 for submittal of such an agreement to the legislatures for approval.

MISSOURI DEPARTMENT OF NATURAL RESOURCES
P.O. Box 1368 2010 Missouri Blvd. Jefferson City, Missouri 65102 (314) 751-3241

MEMORANDUM

Subject: Allocation of Missouri River Water

The question of allocation of the Missouri River is the single, biggest, most important issue the newly-formed Missouri Basin States Association could elect to discuss. This is not a new question; the study paper prepared by the basin staff on the Flood Control Act of 1944 reminds us that water allocation was a central concern of both the upstream water development plans of Sloan and the downstream plans of Pick. When the two plans were added together, the solution to allocation problems unfortunately, was left for the future. Now, four decades later, water planners do foresee an end to the period when each state can determine for itself, without regard to sister states, what and how much each state will use of interstate waters of the Missouri River.

What Is The Ultimate Goal?

The ultimate goal of Basin Association work on water allocation may not be a hard and fast final division of the waters of the Missouri River. Allocation without regard for the unforseen would be unwise. The best of all possible arrangements may be some kind of assurance to all basin states that they will continue to have adequate flows which are fair and equitably proportioned, and that no one state can dominate the uses of the Missouri River to the detriment of the others. The ultimate institutional arrangement to reach this goal may be some kind of an interstate compact for multiple purpose water allocation which will include both states and the U.S. Government. From our individual state point of view, the ultimate for Missouri's self interest is to be assured of adequate downstream flows.

Why Is This a Problem?

The current concerns about water allocation are certainly prompted by the well-publicized proposal to sell water from Oahe reservoir to the Energy Transportation System Incorporated for use in a coal slurry pipeline. In addition, the Basin States Association report of other water diversions and consumptive water use developments has alerted people to numerous other proposals. The runoff impounded behind the Missouri River mainstem dams is a resource for which there are now many competing demands. This leads us to understand that as con-

sumptive use increases in the basin, the prospects of reduced flows of the Missouri River have become very real.

A number of studies have projected water shortages in the Missouri Basin in the future. A Congressional Research Services study by Warren Viesman says that streamflow in many parts of the Missouri basin will be insufficient to meet projected water needs. This shortage is largely the result of the growing conflicts between offstream uses of water (such as irrigation) and the instream uses (hydropower, navigation, and maintenance of the ecological system). Viesman believes that these conflicts are expected to occur in all subbasins of the Missouri River Basin by the year 2000.

In recent years in Missouri we have experienced the beginnings of limitations on Missouri River flows. The navigation system has been handicapped by reduction in the length of the season; the Corps of Engineers began (but could not complete) a test of the effects of minimum downstream releases from the mainstem dams. Other studies have projected that the average daily discharge of the Missouri River at Kansas City could be decreased by as much as 40% by the year 2020 because of the increased consumptive use and the diversions upstream.

All this means that as water consumption in the basin increases, the prospect of decreased flows becomes serious. We see the uses of the Missouri river in our state impacted by limited flows in several ways:

1. handicaps to navigation
2. loss of dilution factors for improvement of water quality
3. impacts on quality of the public drinking water supply
4. mechanical difficulties with the river intakes during time of low-flow
5. problems with habitat for fish and wildlife
6. handicaps to additional steam-electrical generation plants along the Missouri River
7. decreased flows at the Port of St. Louis (critical in drought times).

In short, if all the consumptive uses and diversions become a reality, then it is easy to foresee that there will be severe impacts on Missouri's use of the Missouri river.

What Is The Logical First Step?

Agreement among the states on water use can be accomplished in several ways, but the federal interstate compact method may be the best one to insure

that all basin states work together to resolve the question of equity in water use. Nowdays, we have numerous examples of compacts; a congressional survey in 1968 reported at least 30 compacts were in force which governed use of the water in interstate streams. Most of these compacts have been developed in a period after the original 1944 Pick-Sloan Missouri Basin Act.

There are two words of caution about interstate compacts. First, a common criticism of compacts is the length of time required to bring one to completion. A study in 1953 showed that interstate compacts require about nine years for total approval. This, however, may be a mistake in time estimation because it includes the internal problems of bringing final drafts of the compacts to state legislatures and to Congress. Actually, the proposed terms of any compact on the Missouri river should be worked out in a much shorter length of time, and then could be forwarded for approval of the legislative bodies.

Second, compacts have been considered before for the Missouri River Basin. In the early 1950's, the basin states attempted to negotiate an interstate compact, with the United States included as a signatory to the agreement. A controversy broke out between federal and state domination, and the proposed Missouri River compact of 1953 was never bought to the states for adoption. Apparently, the question of the federal role in the basin prevented completion of that compact. The basin states would have to work to prevent this happening again.

A logical first step would be to address the single problem of sale or transfer of water beyond state boundaries and outside of the Missouri River Basin. The states should work together on some arrangement to regulate such diversions. This would involve:

1. an examination of the principles of the equity and logic that should govern transfer of water resources from one basin to another

2. identifying the appropriate uses of the Missouri River

3. identifying when and where such transfers would be appropriate

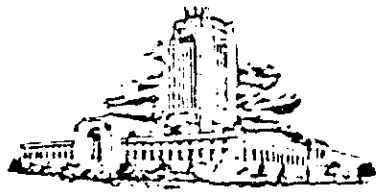
4. working out a system for approval so that all affected states are considered when there are proposals for transfer.

What is needed is to set a goal for an agreement on water diversions, and then move beyond the talk stage. This means the basin states would have to develope a schedule and a timetable, and make a concrete program to move quickly.

The advantage of this kind of first effort now is that the questions of diversions is still a limited one. This means some kind of an agreement could be worked out which would guarantee that each state's interest were not sacrificed and that controversies could be settled amicably. This may be the best time in the history of the basin to work on this question.

RLD:mr

CHARLES THONE
GOVERNOR



EXECUTIVE COORDINATOR
OF NATURAL RESOURCES
AND
SPECIAL ASSISTANT
TO THE GOVERNOR

STATE of NEBRASKA
Room 2310, State Capitol
Lincoln, Nebraska 68509
(402) 471-2546

MEMORANDUM

SUBJECT: NEBRASKA POSITION ON MISSOURI RIVER WATERS

Waters of the Missouri River are among Nebraska's most valuable natural resources. It is imperative that these waters be available to the greatest extent possible for use by Nebraskans in a variety of ways.

We are keenly aware that other states in the Basin have the same concerns as to use of Missouri River within their boundaries and that some interest has been expressed recently for using some of this water for export out of the Basin.

We believe the interests of all people in the Missouri Basin will best be served if the 10 states sharing some portion of the Basin can use the Missouri Basin States Association to reach agreement on how these potentially competing demands on the river can be accommodated.

Toward that end, the Governor's Office in Nebraska has invited comment from a variety of organizations and agencies in the state that have knowledge and interest in the Missouri River. Response from these groups shows nearly unanimous support for the effort being initiated by MBSA to avoid potential conflicts of allocation of these waters. We appreciate the cooperative and generally harmonious attitude being exhibited by state representatives on the Association board and their willingness to seek consensus on the handling of Missouri River water.

As a prelude to any such agreement, Nebraska views it as essential that an assessment be completed of Missouri River water now being used in the Basin and that which can reasonably be expected to be used within the Basin in the future. It will be essential also that such an assessment be as accurate as existing data permit and that it has the confidence of officials in all the Basin states. We hope that the hydrology study now being conducted by MBSA will meet these criteria and that it will be completed by October 1, as scheduled.

With that information available, Nebraska proposes that the MBSA pursue its quest for agreement on two fronts: Provisions for assuring a designated minimum flow in the Missouri River for each state affected by its flow and

provisions governing the possible inter-basin transfer of any Missouri River water deemed to be in excess of anticipated demands within the Basin.

Stream Flows. Nebraska has a wide range of interest in the use of Missouri River water. Without any effort to rank them by preference, these uses include:

1. Municipal water supply
2. Agricultural water supply
3. Electrical generation, including main stem hydropower generation and cooling water for fossil fuel and nuclear plants
4. Navigation below Sioux City
5. Maintenance of fisheries habitat, including in both the river and oxbows
6. Maintenance of wildlife habitat, including both the river and associated wetlands
7. Outdoor recreation
8. Water quality maintenance
9. Channel maintenance

We feel any basin-wide agreement should provide for present and reasonably expectable future uses for these purposes.

Inter-Basin Transfer. Agreement of the Basin states should be sought regarding the extent, if any, to which Missouri River water supplies, which exceed existing and anticipated demands within the Basin, might be exported out of the Basin.

Any inter-basin transfer, however, should be permitted only by agreement of some degree of a majority of all the basin states. This mandate might be expressed by a specific set of criteria to be met in such cases or by approval of the MBSA board on a case-by-case basis.

Consideration should be given to establishing provisions that would insure some share of compensation or benefits to all the Basin states for the sale of water outside the Basin.

In all these considerations, ways should be sought to assist states in which large Missouri River reservoirs are located to derive equitable benefits from Missouri River waters.

Nebraska is open to suggestions as to the form any agreement would take. A formal compact is the most obvious vehicle but if a form is available that would be less cumbersome, but still binding, we are ready to consider it.

Nebraska urges the MBSA to proceed as rapidly as possible to seek an agreement among the states, drawing on technical and legal expertise from the various states and beyond.

JH:ds

Governor Allen I. Olson
January 28, 1982
Bismarck, North Dakota

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GOVERNOR'S POLICY STATEMENT - MISSOURI RIVER WATER USE

The Pick-Sloan Plan for comprehensive development of the water resources of the Missouri River Basin was approved by Congress on December 22, 1944. This important legislative act is now commonly referred to as the Flood Control Act of 1944.

It is actually a combination of two plans developed separately to recognize the widely varying differences which exist between the upper basin states and the lower basin states. Neither the Corps of Engineers Plan (Pick), which was directed primarily at flood control and navigation for the downstream states, nor the Bureau of Reclamation Plan (Sloan), which provided for preservation of sufficient waters for irrigation and other uses essential to the economy of the arid and semi arid upper basin states could muster sufficient Congressional support for passage.

When this became obvious to Congressional leaders and the citizens in the Basin, the two plans were combined and submitted to Congress in November, 1944, and enacted into legislation the following month.

As adopted, the law contains unique guarantees relative to insuring equitable distribution of the benefits of the program. Residents of the lower basin are to receive flood control, stablilized water for domestic and industrial uses, stream sanitation and navigation within specified limitations. Citizens of the upper basin are to receive sufficient water for irrigation uses and other certain beneficial consumptive uses in accordance with a specific provision, the O'Mahoney-Millikin Amendment, which limited the use of waters for navigation to that amount which would not conflict with those enumerated upstream beneficial uses.

The O'Mahoney-Millikin Amendment was directed toward the preservation of sufficient quantities of water to provide for economic development and public use for the citizens of the upper basin states. Its focus was on irrigation development because of the agricultural nature of the states involved. It contains the following language:

> The use for navigation of waters arising in states lying wholly or partly west of the 98th meridian shall be only such as does not conflict with any beneficial consumptive use, present or future, in states lying wholly or partly west of the 98th meridian of such waters for domestic, municipal, stockwater, irrigation, mining or industrial purposes.

The Missouri River is a "gaining" river - it more than doubles in flow from Sioux City to its juncture with the Mississippi River. The impoundments in the upper basin are a stabilizing factor on long-term flows and navigation has benefitted greatly from their construction and will continue to benefit even when the upper basin states have realized the benefits assured under the Pick-Sloan Plan.

It is the official policy position of the Governor of North Dakota that the action by Congress embodied in the Flood Control Act of 1944, as amended, resulted in a major allocation of the waters of the Missouri River among the basin states. Completion of the Pick-Sloan Missouri Basin program, of which the Garrison Diversion Unit is an integral part, is a matter of priority. Any attempt to change the allocation of the waters already approved by the Congress is considered not to be in the best interests of the state.

We are willing to contribute the effort necessary to assist in coordination of the actions of individual states to assure that maximum benefits are realized for all states consistent with the provisions of the 1944 Flood Control Act.

Allocation of Missouri River Water

Position Statement
of the
South Dakota Department of Water and Natural Resources

South Dakota supportes the MBSA effort to examine the issue of Missouri River water allocation. We recognize the importance of this issue and realize there will be increasing demands for the finite but renewable water supply provided by the Missouri River. We believe, however, that sufficient water is available to meet the reasonable needs of all Missouri Basin states and that there is no present cause for hysteria.

During the examination of this issue, we must recognize that the allocation of Missouri River water and the system for such allocation has at least partially been determined by previous Acts and efforts. Specifically, the 1944 Flood Control Act sets forth the basic allocation system by function (domestic, municipal, industrial, irrigation, etc.). Also, it is important to note that the Missouri River Basin Commission in 1974 concluded that there is an adequate supply of Missouri River water to meet current and future basin state needs. The MRBC Committee on Water Marketing unanimously agreed that "The water supply of the Missouri River, as controlled by the main stem reservoir system is adequate to meet all foreseeable beneficial consumptive uses, including the projected maximum likely ultimate use (sometime beyond the year 2020) of up to 3 million acre feet of water annually for industrual purposes." The MRBC Committee also concluded that "an acceptable degree of service to navigation could be maintained," and that "hydropower peaking would not be affected to any major degree" by the projected consumptive uses.

Also, the Bureau of Reclamation, in its 1977 Water for Energy - Missouri River Reservoirs report, concluded that "up to 1 million acre feet of water could be marketed annually" from the Missouri River for industrial puroses. Further, the Bureau stated that there is a "high probability that hypothetical industrial development levels will not be reached even if sufficient water is available because of other constraints."

Realizing the appropriateness of reviewing and possibly updating the MRRC and Bureau of Reclamation study efforts, the State of South Dakota has supported and will continue to strongly support MBSA efforts to assess current and future use and need for Missouri River water. South Dakota supports and will assist the MBSA in the conduct of appropriate hydrologic studies, data collection and information exchange.

South Dakota also supports discussion of the need for a Missouri River water allocation compact. Such discussion, however, must begin with recognition of the following:

1. The appropriateness of the prior appropriation doctrine for the western basin states including the principle of beneficial use as the basis for lawful appropriations of water;

2. The basic water allocation assumptions, rights, priorities, benefits and obligations contained in the 1944 Flood Control Act;

3. The principle that each state may allocate the waters apportioned to it by any compact in whatever manner it sees fit.

In regard to this last point - the principle of allocation rights - South Dakota wishes to clarify that this principle must include inter-basin transfers. It is the position of South Dakota that there is no reason in logic or law why inter-basin transfers should be discriminated against or judged on factors different than those applied to in-basin uses of water. As our sister states have shown, inter-basin transfers in either direction can provide reasonable solutions to meeting legitimate water needs and can provide commensurate benefits if properly designed. The concept of shared benefits for inter-basin transfers, however, invites inter-state conflict and is practically unworkable.

Given the above background and criteria, South Dakota looks forward to working with the MBSA and member states as we cooperatively examine the issue of Missouri River water allocation.

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WYOMING'S POSITION ON ALLOCATION OF MISSOURI RIVER WATER

The State of Wyoming is in a somewhat different position from all other Basin states, except Colorado, when allocation of the waters of the Missouri River among the states of the Basin is discussed. The majority of the streams tributary to the Missouri River which are located in Wyoming have already been allocated among Wyoming and the surrounding states of Montana, South Dakota, Nebraska, and Colorado by interstate compacts or United States Supreme Court Decrees. The arid climate of the Upper Basin states and the increasing demands on a limited supply of water caused these states to realize many years ago that an equitable apportionment of rivers flowing through two or more states was necessary in order to ensure continued development. In some cases, the water was apportioned through litigation among the states by Supreme Court Decree and in others by negotiation which led to a mutually acceptable compact.

In the Missouri River Basin in Wyoming, the waters of the Laramie River were divided between Colorado and Wyoming by United States Supreme Court Decree as were those of the North Platte River among Colorado, Wyoming, and Nebraska. The Belle Fourche and Upper Niobrara Rivers and the major tributaries of the Yellowstone River which originate in Wyoming were apportioned by interstate compacts with downstream states. The only waters in the Missouri River Basin in Wyoming which are not regulated by a compact or decree are the Little Missouri River, the Cheyenne River, and some small tributaries of the South Platte River in the southeast part of the State. Serious efforts have been made in the past to negotiate compacts on both the Little Missouri and Cheyenne Rivers.

At the same time that many of these compacts and decrees came into being during the 1930's and 1940's, a comprehensive plan for development of the water resources of the Missouri River Basin was being developed. A major impetus behind the development of the plan were the damaging floods of 1943. The Corps of Engineers was authorized to make a new flood control survey of the Missouri River, the final report of which became known as the Pick Plan. The Pick Plan was intended primarily for flood control and navigation on the mainstem of the Missouri.

Previously, the Bureau of Reclamation had been requested to prepare a report on potential irrigation projects in the Missouri Basin. This report was known as the Sloan Plan and was intended for irrigation development, mostly in the Upper Basin where irrigation was needed to produce crops.

Neither plan was able to make it through Congress. The upstream states were concerned that the Pick Plan would commit water to downsteam uses such as navigation while the downstream states were concerned that the Sloan Plan would allow depletions for irrigation to such an extent that navigation would be precluded.

The Flood Control Act of 1944 contained a combination plan, known as the Pick-Sloan Plan, which in effect allocated the waters of the Missouri River between upstream and downstream states by attempting to provide for equal benefits for each. This compromise legislation passed because both factions were able to support it. In addition to providing for projects to benefit both upstream and downstream states, the Flood Control Act was amended to provide that water rising in states lying wholly or partly west of the 98th meridian can be used for navigation only as it does not conflict with beneficial consumptive use for domestic, municipal, stock, irrigation, mining, and industrial purposes. This amendment was one of the O'Mahoney-Millikin amendments, as they are generally known.

Water from a river or aquifer is allocated among states through which the river flows or under which the aquifer lies in order to provide that each state will have an opportunity for economic and public or recreational development to the extent that an equitable apportionment of the limited available supply will allow. Allocation of the waters of the State of Wyoming tributary to the Missouri River between Wyoming and other states in the basin has been accomplished through interstate compacts, court decrees, and the Flood Control Act of 1944, all of which have been approved by Congress. We believe that the Flood Control Act of 1944 resulted in a major allocation of waters of the Missouri River among the basin states and is a given in any discussions concerning the Missouri River.

We believe that dialogue among the states should start with a complete understanding of the Flood Control Act of 1944, and further believe that there is sufficient water in the system to serve the diverse needs of all the states.

May, 1982

58 Stat. 887

[CHAPTER 665]

AN ACT

Authorizing the construction of certain public works on rivers and harbors for flood control, and for other purposes.

December 22, 1944
[H. R. 4485]
[Public Law 534]

Navigation and flood control.
Declaration of policy.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, In connection with the exercise of jurisdiction over the rivers of the Nation through the construction of works of improvement, for navigation or flood control, as herein authorized, it is hereby declared to be the policy of the Congress 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; to facilitate the consideration of projects on a basis of comprehensive and coordinated development; and to limit the authorization and construction of navigation works to those in which a substantial benefit to navigation will be realized therefrom and which can be operated consistently with appropriate and economic use of the waters of such rivers by other users.

In conformity with this policy:

Submission of plans, reports, etc.

(a) Plans, proposals, or reports of the Chief of Engineers, War Department, for any works of improvement for navigation or flood control not heretofore or herein authorized, shall be submitted to the Congress only upon compliance with the provisions of this paragraph (a).

Interests of affected States.

Investigations which form the basis of any such plans, proposals, or reports shall be conducted in such a manner as to give to the affected State or States, during the course of the investigations, information developed by the investigations and also opportunity for consultation regarding plans and proposals, and, to the extent deemed practicable by the Chief of Engineers, opportunity to cooperate in the investigations.

Waters arising west of 97th meridian.

If such investigations in whole or part are concerned with the use or control of waters arising west of the ninety-seventh meridian, the Chief of Engineers shall give to the Secretary of the Interior, during the course of the investigations, information developed by the investigations and also opportunity for consultation regarding plans and proposals, and to the extent deemed practicable by the Chief of Engineers, opportunity to cooperate in the investigations.

Representative for State.

The relations of the Chief of Engineers with any State under this paragraph (a) shall be with the Governor of the State or such official or agency of the State as the Governor may designate.

"Affected State or States."

The term "affected State or States" shall include those in which the works or any part thereof are proposed to be located; those which in whole or part are both within the drainage basin involved and situated in a State lying wholly or in part west of the ninety-eighth meridian; and such of those which are east of the ninety-eighth meridian as, in the judgment of the Chief of Engineers, will be substantially affected.

Coordination with other plans.

Such plans, proposals, or reports and related investigations shall be made to the end, among other things, of facilitating the coordination of plans for the construction and operation of the proposed works with other plans involving the waters which would be used or controlled by such proposed works.

Each report submitting any such plans or proposals to the Congress shall set out therein, among other things, the relationship between the plans for construction and operation of the proposed works and the plans, if any, submitted by the affected States and by the Secretary of the Interior.

Transmittal of proposed report to States, etc.

The Chief of Engineers shall transmit a copy of his proposed report to each affected State, and, in case the plans or proposals covered by the report are concerned with the use or control of waters which rise in whole or in part west of the ninety-seventh meridian, to the Secretary of the Interior.

Views and recommendations.

Within ninety days from the date of receipt of said proposed report, the written views and recommendations of each affected State and of the Secretary of the Interior may be submitted to the Chief of Engineers.

Transmittal of proposed report to Congress.

The Secretary of War shall transmit to the Congress, with such comments and recommendations as he deems appropriate, the proposed report together with the submitted views and recommendations of affected States and

of the Secretary of the Interior. The Secretary of War may prepare and make said transmittal any time following said ninety-day period. The letter of transmittal and its attachments shall be printed as a House or Senate document.

Use of waters of western States for navigation.

(b) The use for navigation, in connection with the operation and maintenance of such works herein authorized for construction, of waters arising in States lying wholly or partly west of the ninety-eighth meridian shall be only 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, mining, or industrial purposes.

Irrigation works. Investigations and reports.

(c) The Secretary of the Interior, in making investigations of and reports on works for irrigation and purposes incidental thereto shall, in relation to an affected State or States (as defined in paragraph (a) of this section), and to the Secretary of War, be subject to the same provisions regarding investigations, plans, proposals, and reports as prescribed in paragraph (a) of this section for the Chief of Engineers and the Secretary of War. In the event a submission of views and recommendations, made by an affected State or by the Secretary of War pursuant to said provisions, sets forth objections to the plans or proposals covered by the report of the Secretary of the Interior, the proposed works shall not be deemed authorized except upon approval by an Act of Congress; and subsection 9 (a) of the Reclamation Project Act of 1939 (53 Stat. 1187) and subsection 3 (a) of the Act of August 11, 1939 (53 Stat. 1418), as amended, are hereby amended accordingly.

Objection by affected State, etc.; effect.

53 Stat. 1193.
43 U. S. C. § 485h (a).
54 Stat. 1120.
16 U. S. C. § 500s-1 (a); Supp. III, § 500s-1 (a).

Approval of designated plans.

SEC. 9. (a) The general comprehensive plans set forth in House Document 475 and Senate Document 191, Seventy-eighth Congress, second session, as revised and coordinated by Senate Document 247, Seventy-eighth Congress, second session, are hereby approved and the initial stages recommended are hereby authorized and shall be prosecuted by the War Department and the Department of the Interior as speedily as may be consistent with budgetary requirements.

Missouri River Basin.

(b) The general comprehensive plan for flood control and other purposes in the Missouri River Basin approved by the Act of June 28, 1938, as modified by subsequent Acts, is hereby expanded to include the works referred to in paragraph (a) to be undertaken by the War Department; and said expanded plan shall be prosecuted under the direction of the Secretary of War and supervision of the Chief of Engineers.

52 Stat. 1218.

Reclamation and power developments.

(c) Subject to the basin-wide findings and recommendations regarding the benefits, the allocations of costs and the repayments by water users, made in said House and Senate documents, the reclamation and power developments to be undertaken by the Secretary of the Interior under said plans shall be governed by the Federal Reclamation Laws (Act of June 17, 1902, 32 Stat. 388, and Acts amendatory thereof or supplementary thereto), except that irrigation of Indian trust and tribal lands, and repayment therefor, shall be in accordance with the laws relating to Indian lands.

43 U. S. C. § 485a (a).
Ante, p. 279.

Additional sums authorized.

(d) In addition to previous authorizations there is hereby authorized to be appropriated the sum of $200,000,000 for the partial accomplishment of the works to be undertaken under said expanded plans by the Corps of Engineers.

(e) The sum of $200,000,000 is hereby authorized to be appropriated for the partial accomplishment of the works to be undertaken under said plans by the Secretary of the Interior.

97TH CONGRESS
1ST SESSION

H. R. 1374

To provide that Federal rights-of-way may be issued for coal pipelines utilizing groundwater only where affected States have approved such utilization, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JANUARY 28, 1981

Mr. DASCHLE introduced the following bill; which was referred to the Committee on Interior and Insular Affairs

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A BILL

To provide that Federal rights-of-way may be issued for coal pipelines utilizing groundwater only where affected States have approved such utilization, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in the case of any pipeline to be utilized for the transportation of coal, where the pipeline uses any groundwater in connection with such transportation, no right-of-way may be granted for such pipeline under title V of the Federal Land Policy and Management Act of 1976 unless each State affected by the use of such groundwater has consented to such

use in such manner, and pursuant to such procedures, as may be determined pursuant to State law.

SEC. 2. Each application under title V of the Federal Land Policy and Management Act of 1976 for a right-of-way for a pipeline to be used for the transportation of coal shall include such hydrological, geological, and other technical information as the Secretary of the Interior (or the Secretary of Agriculture in the case of an application made to the Secretary of Agriculture) deems necessary to determine the States within which groundwater is affected by such pipeline.

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97TH CONGRESS
1ST SESSION

H. R. 5278

To prohibit any State from selling or otherwise transferring interstate waters located in such State for use outside such State unless all other States in the drainage basin of such waters consent to such sale or transfer.

IN THE HOUSE OF REPRESENTATIVES

DECEMBER 16, 1981

Mr. BEDELL (for himself, Mr. BEREUTER, Mr. HARKIN, Mr. SMITH of Iowa, Mr. LEACH of Iowa, Mr. TAUKE, Mr. EVANS of Iowa, Mr. DAUB, Mr. GEPHARDT, Mr. SKELTON, Mr. VOLKMER, Mr. COLEMAN, Mr. BAILEY of Missouri, Mr. WHITTAKER, Mr. TAYLOR, Mr. EMERSON, and Mr. MARLENEE) introduced the following bill; which was referred to the Committee on Interior and Insular Affairs

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A BILL

To prohibit any State from selling or otherwise transferring interstate waters located in such State for use outside such State unless all other States in the drainage basin of such waters consent to such sale or transfer.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no State shall sell or otherwise transfer, for use outside of such State, water which is taken from any river or other body of surface water which is located in or which passes

through more than one State or any aquifer or other body of ground water which underlies more than one State unless—

(1) there is in effect an interstate compact (A) between the States in the drainage basin of such river or other body of surface water, or (B) between the affected States, in the case of such an aquifer or other body of ground water, which governs such sale or transfer, and

(2) all the States which are parties to such compact consent to such sale or transfer.

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97TH CONGRESS
1ST SESSION

H. R. 4230

To facilitate the transportation of coal by pipeline across Federal and non-Federal lands.

IN THE HOUSE OF REPRESENTATIVES

JULY 22, 1981

Mr. UDALL (for himself, Mr. HOWARD, Mr. LUJAN, Mr. CLAUSEN, Mr. MCCOLLUM, Mr. FUQUA, Mr. GIBBONS, and Mr. BREAUX) introduced the following bill; which was referred jointly to the Committees on Interior and Insular Affairs and Public Works and Transportation

SEPTEMBER 23, 1981

Additional sponsors: Mr. TAUZIN, Mr. IRELAND, Mr. SUNIA, Mr. YOUNG of Missouri, Mr. MARRIOTT, Mr. HUCKABY, Mr. NELSON, Mr. LAGOMARSINO, Mr. LEHMAN, Mr. HUTTO, Mr. WILSON, Mr. SHAW, Mr. FASCELL, Mr. ROSE, Mr. CLINGER, Mr. GINGRICH, Mr. BADHAM, Mr. STOKES, Mr. SOLOMON, Mr. MARTIN of North Carolina, Mr. ROUSSELOT, and Mr. LOEFFLER

A BILL

To facilitate the transportation of coal by pipeline across Federal and non-Federal lands.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

and such coal pipeline may be extended or acquired, only as provided in this section and sections 6 and 7 of this Act.

(b)(1) The granting and administration of any right-of-way for a coal pipeline over, under, upon, or through Federal lands pursuant to an application or other request which—

(A) was made under title V of the Federal Land Policy and Management Act of 1976 (Public Law 94–579) or under any other authority of law, and

(B) was not finally disposed of before the date of enactment of this Act,

shall be governed by such title V or other authority of law, as the case may be. The provisions of this section and sections 6 and 7 of this Act shall not affect any proceedings respecting any such application or other request.

(2) The provisions of this section and sections 6 and 7 of this Act shall not affect law suits commenced prior to the date of enactment of this Act.

REGULATIONS

SEC. 9. The Secretary of the Interior may issue such regulations as may be necessary to carry out sections 6, 7, and 8 of this Act.

STATE WATER LAW

SEC. 10. (a) The United States or its agents, permittees, licensees, or transferees shall not reserve, appropriate, use, divert, dedicate, or claim water within any State for a coal

pipeline holding a certificate issued under section 10952 of title 49, United States Code, unless such reservation, appropriation, use, diversion, dedication, or claim takes place pursuant to State substantive and procedural law.

(b) Pursuant to the commerce clause in article I, section 8, of the United States Constitution, the Congress declares that the establishment and exercise of terms or conditions, including terms or conditions terminating use, on permits or authorizations for the reservation, appropriation, use, or diversion of water for a coal pipeline for which a certificate is issued under section 10952 of title 49, United States Code, shall be determined pursuant to State law notwithstanding any transportation, use, or disposal of such water in interstate commerce.

(c) Nothing in this Act shall alter in any way any provision of State law, regulation, or rule of law or of any interstate compact governing the appropriation, use, or diversion of water.

COAL PIPELINE SAFETY

SEC. 11. (a) Within one year after the date of enactment of this Act, the Secretary of Transportation shall issue regulations establishing uniform Federal standards for the safe design, installation, inspection, emergency plans and procedures, testing, construction, extension, operation, replacement, and maintenance of coal pipeline facilities. Standards