UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE OGLALA SIOUX TRIBE OF THE PINE RIDGE INDIAN RESERVATION, Plaintiff, v. THE UNITED STATES ARMY CORPS OF ENGINEERS; LES BROWNLEE, Acting Secretary of the Army; DOMONIC IZZO, Principal Deputy Assistant Secretary of the Army for Civil Works; ROBERT B. FLOWERS, Chief of Engineers; KURT F. UBBELOHDE, Omaha District Commander and District Engineer, Department of the Army, Corps of Enginners, Omaha District; and THE UNITED STATES OF AMERICA, Defendants.	Case No. 1:01CV02679 (GK) Judge Gladys Kessler SECOND AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND RELIEF IN THE NATURE OF MANDAMUS

A. INTRODUCTION.

1. This is an action for declaratory and injunctive relief and relief in the nature of mandamus brought against the United States of America and certain of its agencies, officials and employees. It arises over the transfer and intended transfer by the United States to the State of South Dakota of certain recreation areas and other lands managed by the Army Corps of Engineers along the Missouri River in South Dakota, which lands are the aboriginal homeland of the Oglala Sioux people and the other peoples of the Sioux Nation, and in which the Oglala Sioux people continue to own legally-protected interests.

B. PARTIES.

2. Plaintiff OGLALA SIOUX TRIBE is a body politic comprised of approximately 41,000 citizens with territory of over 4,700 square miles in the southwestern portion of South Dakota.

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The Oglala Sioux Tribe is the freely and democratically-elected government of the Oglala Sioux people, with a governing body duly recognized by the Secretary of Interior. The Oglala Sioux Tribe is the successor-in-interest to the Oglala Band of the Teton Division of the Sioux Nation, and is a protectorate nation of Defendant THE UNITED STATES OF AMERICA. The Oglala Band reorganized in 1936 as the "Oglala Sioux Tribe of the Pine Ridge Indian Reservation" ("Oglala Sioux Tribe" or "Tribe") under section 16 of the Indian Reorganization Act of June 18, 1934, ch. 576, 48 Stat. 987, 25 U.S.C. § 476, and enjoys all of the rights and privileges guaranteed under its existing treaties with the United States in accordance with 25 U.S.C. § 478b. Its address is P.O. Box 2070, Pine Ridge, South Dakota 57770-2070.

3. Defendant ARMY CORPS OF ENGINEERS ("Army Corps" or "Corps") is an executive agency of the United States and a branch of the United States Department of the Army. Its address is 441 G. Street NW, Washington, D.C. 20314.

4. Defendant LES BROWNLEE is the duly appointed and acting Secretary of the Army. His address is the Pentagon, Washington, D.C. 20310. He is being sued in his official capacity.

5. Defendant DOMINIC IZZO is the duly appointed and acting Principal Deputy Assistant Secretary of the Army in charge of Civil Works. His address is 108 Army-Pentagon, Washington, D.C. 20310-0108. He is being sued in his official capacity.

6. Defendant ROBERT B. FLOWERS is the Chief of Engineers of the Army Corps. His address is 441 G Street NW, Washington, D.C. 20314. He is being sued in his official capacity.

7. Defendant KURT F. UBBELOHDE is the Omaha District Commander and District Engineer in charge of civil works. His address is Department of the Army, Corps of Engineers, Omaha District, 106 South 15th Street, Omaha, Nebraska 68102-1618. He is being sued in his official capacity.

8. Defendant THE UNITED STATES OF AMERICA is a body politic existing pursuant to the Constitution of the United States of America.

C. JURISDICTION.

9. This action arises under the Constitution and laws of the United States, including U.S. Const. Art. 6 (Supremacy Clause) and Amend. 5 (Due Process and Takings Clauses); the Treaty of July 2, 1825, United States-Oglala Band of Sioux Nation, 7 Stat. 252; Rev. Stat. § 2116, 25 U.S.C. § 177 (*codifying* section 12 of the Trade and Intercourse Act of June 30, 1834, ch. 161, 4 Stat. 730); the Treaty of September 17, 1851, United States-Teton Division of Sioux Nation, *et al.*, 11 Stat. 749; the Treaty of April 29, 1868, United States-Sioux Nation,15 Stat. 635; Rev. Stat. § 2079, 25 U.S.C. § 71 (*codifying* the Act of March 3, 1871, ch. 120, § 1, 16 Stat. 566); the Act of March 2, 1889, ch. 405, 25 Stat. 888; the Act of June 18, 1934, ch. 576, 48 Stat. 987, *as amended*, 25 U.S.C. § 461 *et seq.*; the Water Resources Development Act of August 17, 1999, P. L. 106-53, Title VI, §§ 601-609,113 Stat. 269, 385, *as amended by* the Water Resources Development Act of December 11, 2000, P. L. 106-541, Title V, § 540, 114 Stat. 2572, 2664; the National Historic Preservation Act of October 15, 1966, P.L. 89-665, 80 Stat. 915, *as amended*, 16 U.S.C. § 470 *et seq.*; the Native American Graves Protection and Repatriation Act of November 16, 1990, P.L. 101-601, 104 Stat. 3048, *as amended*, 25 U.S.C. § 3001 *et seq.*; and other federal statutory and common law.

10. Jurisdiction over this action is conferred on this Court by 28 U.S.C. § 1331(a), as this is a civil action arising under the Constitution, laws and treaties of the United States; 28 U.S.C. § 1361, as this is an action in the nature of mandamus to compel an officer or employee of the United States or an agency thereof to perform a duty owed to Plaintiff; and 28 U.S.C. § 1362, as this is a civil action brought by an Indian tribe with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws and treaties of the United States.

11. Venue is proper in this Court in accordance with 28 U.S.C. § 1391(b)(2) and (e)(1) and (2), as a substantial part of the events or omissions giving rise to Plaintiff's claims occurred in this District and one or more Defendants in this action reside in this District.

D. STATEMENT OF FACTS.

12. The Sioux Nation is comprised of seven divisions: (1) Medawakanton; (2) Sisseton; (3) Wahpakoota; (4) Wahpeton; (5) Yankton; (6) Yantonai; and (7) Teton. *Sioux Nation v. United States*, 24 Ind. Cl. Comm. 147, 162 (1970).

13. The Teton Division is comprised of seven distinct, sovereign bands: (1) Blackfeet; (2) Brule; (3) Hunkpapa; (4) Minneconjou; (5) No Bows; (6) Oglala; and (7) Two Kettle. The members of these bands currently reside generally on the following reservations in South Dakota:

TETON BAND	RESERVATION
Blackfeet	Cheyenne River Reservation
Brule	Rosebud Reservation and Lower Brule Reservation
Hunkpapa	Standing Rock Reservation
Minneconjou	Cheyenne River Reservation
No Bows	Cheyenne River Reservation
Oglala	Pine Ridge Reservation
Two Kettle	Cheyenne River Reservation

14. Since time immemorial and up to and through the time of some of the actions which form the basis of this Complaint, the seven Teton bands, jointly and severally, have exclusively used and occupied the following described territory in the Missouri River basin, delineated on the map attached hereto as Exhibit "A" and incorporated herein:

(a) West of the Missouri River, approximately sixty million acres of land in what are now the States of North Dakota, South Dakota, Nebraska, Montana and Wyoming; and

(b) East of the Missouri River, approximately fourteen million acres of land in what are now the States of North Dakota and South Dakota.

15. At least as early as the Tenth Century, members of the seven Teton bands maintained intimate ties of kinship, religion, ceremony, and trade with the agricultural tribal peoples that occupied large earth-lodge villages within the Missouri River trench, i.e., the Arikara, Hidatsa, and Mandan peoples. The Teton people and the village peoples gathered seasonally at their Missouri River trench villages to trade and to conduct shared ceremonies. While camped together, they intermarried, had children and buried their dead together. The Teton bands supplied these village peoples with meat, hides and furs from hunting and trapping, and other commodities acquired through other long-distance trade relations, such as copper from the Great Lakes region and obsidian from the Yellowstone region. In exchange the village peoples supplied the Teton bands with maize, beans, and other farm products.

16. These relationships continued until the Arikara, Hidatsa and Mandan were removed from their territories by the United States in the early Nineteenth Century.

17. The United States and the Oglala Band entered into a treaty of friendship and protection on July 5, 1825, 7 Stat. 252, which treaty was duly ratified by the United States and proclaimed on February 6, 1826. By Article 2 of the 1825 Treaty, the United States brought the Oglala Band and its members under its protection and the Oglala Band became a protectorate nation of the United States.

18. By Article 3 of the 1825 Treaty, Congress extended the Trade and Intercourse Acts to the Oglala Band and its aboriginal territory, including permanent successor provisions of section 12 of the Act of June 30, 1834, ch. 161, 4 Stat. 730, *currently codified at* Rev. Stat. §

2216, 25 U.S.C. § 177, which provides that "[n]o purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution."

19. The United States and the seven bands of the Teton Division of the Sioux Nation, and others, entered into a treaty on September 17, 1851, 11 Stat. 749 ("1851 Fort Laramie Treaty" or "1851 Treaty"), which treaty was duly ratified by the United States. Article 5 of the 1851 Fort Laramie Treaty defined the territory of the bands of the Teton Division as follows ("1851 Treaty territory"):

> commencing the mouth of the White Earth River, on the Missouri River; thence in a southwesterly direction to the forks of the Platte River; thence up the north fork of the Platte River to a point known as the Red Bute, or where the road leaves the river; thence along the range of mountains known as the Black Hills, to the head-waters of the Heart River; thence down Heart River to its mouth; and thence down the Missouri River to the place of beginning.

20. In *Sioux Tribe v. United States*, 15 Ind. Cl. Comm. 577 (1965), the Indian Claims Commission ruled that the 1851 Treaty was a multi-lateral treaty by which the United States recognized the aboriginal territory of not only the seven Teton bands, but also the aboriginal territories of the other signatory tribes, including the Hidatsa, also known as the Gros-Ventre, the Mandan and the Arikara tribes. The Commission ruled that article 5 of the 1851 Treaty recognized the seven Teton bands' joint and several aboriginal Indian title to the entire sixty million acre area west of the Missouri River referred to in paragraph 14(a), above.

21. In *Sioux Nation v. United States*, 23 Ind. Cl. Comm. 419, 424 (1970), the Commission further determined that the seven Teton bands also held aboriginal Indian title to

the entire fourteen million acre area east of the Missouri River referred to in paragraph 14(b), above.

22. Unconsented encroachments on the 1851 Treaty territory by the United States and its citizens resulted in the Powder River War of 1866-1868 between the United States and the Teton bands. Peace was concluded between the United States and the Teton bands by treaty on April 29, 1868, 15 Stat. 635 ("1868 Fort Laramie Treaty" or "1868 Treaty"), which treaty was duly ratified by the United States on February 16, 1869 and proclaimed on February 24, 1869. The 1868 Treaty provided for a mutual demobilization without terms of surrender on either side.

23. Article 2 of the 1868 Treaty established a designated territory within the 1851 Treaty territory boundaries for the seven Teton bands and other Sioux bands. This territory is commonly referred to as the "Great Sioux Reservation," and is described in article 2 of the 1868 Treaty as follows:

> Commencing on the east bank of the Missouri River where the forty-sixth parallel of north latitude crosses the same, thence along low-water mark down said east bank to a point opposite where the northern line of the State of Nebraska strikes the river, thence west across said river, and along the northern line of Nebraska to the one hundred and fourth degree of longitude west from Greenwich, thence north on said meridian to a point where the forty-sixth parallel of north latitude intercepts the same, thence due east along said parallel to the place of the beginning; and in addition thereto, all existing reservations on the east bank of the said river shall be, and the same is, set apart for the absolute and undisturbed use and occupation of the Indians herein named . . . .

This territory is delineated on the map attached hereto as Exhibit "B" and incorporated herein. Article 2 of the 1868 Treaty again recognized the seven Teton bands' aboriginal Indian title to all

the lands within the Great Sioux Reservation, which included all lands west of the low water mark of the east bank of the Missouri River, and again vested that title under the Constitution and laws of the United States.

24. Article 12 of the 1868 Treaty further provided that no future cessions of territory within the Great Sioux Reservation would be of "any validity or force . . . unless executed and signed by at least three-fourths of all the adult male Indians, occupying or interested in the same . . . ." Under article 12, the United States and Teton bands agreed to limit their sovereign powers to cede and to accept cessions of land for the protection and peace of both parties.

25. By the Act of February 28, 1877, ch. 72, 19 Stat. 254 ("1877 Act"), Congress purported to ratify and confirm an agreement between commissioners on behalf of the United States and the Teton and other bands of the Sioux Nation and the Northern Cheyenne and Arapaho tribes. The purported agreement provided for the cession of over 7 million acres of territory in the western part of the Great Sioux Reservation, including the Black Hills. No such agreement existed in fact or in law. The territory purportedly agreed to be ceded is delineated in the map attached hereto as Exhibit "B." None of these lands are the subject of this action.

26. In *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980), the Supreme Court held that the 1877 Act amounted to confiscation by the United States of the western end of Great Sioux Reservation, and that such confiscation violated both Article 12 of the 1868 Treaty and the Fifth Amendment to the Constitution

27. By the Act of March 2, 1889, ch. 405, 25 Stat. 888 ("1889 Act"), Congress conditionally provided for the creation of six smaller reservations within the balance of the Great Sioux Reservation, the release of title by Indian persons associated with each smaller reservation to each of the other five smaller reservations, and for the restoration to the public domain and opening to settlement of the balance of territory within the Great Sioux Reservation outside the boundaries of those six smaller reservations. These six smaller reservations are

called the Pine Ridge Indian Reservation, the Rosebud Indian Reservation, the Standing Rock Indian Reservation, the Cheyenne River Indian Reservation, the Lower Brule Indian Reservation and the Crow Creek Indian Reservation, and are delineated on the map attached hereto as Exhibit "C" and incorporated herein. The effectiveness of the 1889 Act was expressly conditioned upon the acceptance of and consent to its provisions in the manner required by article 12 of the 1868 Fort Laramie Treaty, i.e., its execution and signature by three-fourths of the adult male members of the bands and tribes signatory to the 1868 Treaty. Sections 16, 21 and 28 of the 1889 Act provided in part:

> Sec. 16. That the acceptance of this act by the Indians in the manner and form as required by the said treaty concluded between the different bands of the Sioux Nation of Indians and the United States, April twenty-ninth, eighteen hundred and sixty-eight . . . , as hereinafter provided, shall be taken and held to be a release of all title on the part of the Indians receiving rations and annuities on each of the said separate reservations, to the lands described in each of the other reservations so created, and shall be taken and held to confirm in the Indians entitled to receive rations at each of said separate reservations, respectively, to their separate and exclusive use and benefit, all the title and interest of every name and nature secured therein to the different bands of the Sioux Nation by said treaty of April twenty-ninth, eighteen hundred and sixty eight.
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> Sec. 21. That all the lands in the Great Sioux Reservation outside of the separate reservations herein described are hereby restored to the public domain, . . . and shall be disposed of by the united States to actual settlers only, under the provisions of the homestead law . . . . and under the law relating to town-sites: *Provided*, . . . That all lands herein opened to settlement under this act remaining undisposed of at the end of ten years from the taking effect of this act

> shall be taken and accepted by the United States and paid for by said United States at fifty cents per acre, which amount shall be added to and credited to said Indians as part of their permanent fund, and said lands thereafter shall be part of the public domain of the United States, to be disposed of under the homestead laws of the United States, and the provisions of this act . . . .
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> Sec. 28. That this act shall take effect, only, upon the acceptance thereof and consent thereto by the different bands of the Sioux Nation of Indians, in manner and form prescribed by the twelfth article of the treaty between the United States and said Sioux Indians, concluded April twenty-ninth, eighteen hundred and sixty-eight, which said acceptance and consent, shall be made known by proclamation by the President of the United States, upon satisfactory proof presented to him, that the same has been obtained in the manner and form required by said twelfth article of said treaty; which proof shall be presented to him within one year from the passage of this act; and upon failure of such proof and proclamation this act becomes of no effect and null and void.

28. A three-member commission appointed by the Secretary of the Interior (the "Crook Commission") was charged with obtaining the consent of three-fourths of the adult male members of the bands and tribes signatory to the 1868 Treaty for the 1889 Act to take effect in accordance with section 28 of the 1889 Act. The Crook Commission determined that it would seek to have the adult male members associated with each of the six agencies of the Interior Department within the Great Sioux Reservation ("Sioux agencies") sign a quit claim deed in order to evidence their consent under article 12 of the 1868 Treaty in accordance with section 28 of the 1889 Act. The Commission scheduled meetings during the summer of 1889 at the six Sioux agencies to obtain the requisite number of signatures on quit claim deeds.

29. The Crook Commission failed to obtain the consent of three-fourths of the adult male members of the bands and tribes signatory to the 1868 Treaty. Five thousand six hundred seventy-eight (5,678) adult male members were eligible to give consent under article 12 of the 1868 Treaty and section 28 of the 1889 Act. Three-fourths of that number equals 4,259. The Crook Commission obtained no more than 3,942 valid signatures on quit claim deeds. The Commission obtained 4,463 signatures on quit claim deeds, but at least 521 of those signatures were invalid. At least 185 signatures obtained by the Commission were from non-Indian persons, at least 183 signatures were from Indian persons of mixed blood (who were disqualified from signing by section 7 of the Act of February 28, 1877, ch. 72, 19 Stat. 254), at least 104 signatures were from Indian persons not members of the bands and tribes signatory to the 1868 Treaty, at least 43 signatures were from underage (non-adult) Indian persons, at least 3 signatures were from Indian persons who were female, and at least 3 signatures were duplicates.

30. The majority of the signatures obtained by the Crook Commission were obtained through coercion, fraud and bribery, including but not limited to the following means:

(a) False imprisonment, by keeping adult male Indian persons at the Sioux agencies and preventing them from returning to their homes until they signed quit claim deeds;

(b) Threats and intimidation, including but not limited to threatening adult male Indian persons: (i) that Congress would unilaterally take their reservation lands if they did not sign; (ii) that their subsistence rations would be cut if they did not sign; and (iii) that the U.S. military would be brought in to deal with them if they did not sign.

(c) Fraud, by getting adult male Indian persons drunk to secure their signatures;

(d) Fraud, by failing to inform adult male Indian persons that their signatures were being sought in order to approve the cession of approximately nine million acres of territory within the Great Sioux Reservation to the United States; and

(e) Bribery, including but not limited to, offering money, personal favors and issuing beef and other rations to certain individuals to secure signatures.

31. On or about January 30, 1890, the Crook Commission submitted a report concerning its activities to President Benjamin Harrison entitled Report and Proceedings of the Sioux Commission, Sen. Exec. Doc. 51, 51st Cong., 1st Sess. (1890) ("1890 Commission Report"). Among other things, the 1890 Commission Report contained the name of each of the persons from whom the Commission had obtained signatures on quit claim deeds. The census records contained in the 1890 Commission Report show *prima facie* that the Commission failed to obtain signatures from three-fourths of the adult male members eligible to give consent under article 12 of the 1868 Treaty and section 28 of the 1889 Act.

32. On February 10, 1890, President Harrison issued a Proclamation, 26 Stat. 1554 ("1890 Proclamation"), declaring the 1889 Act to be in effect. The Proclamation stated in part:

> I, Benjamin Harrison, President of the United States, by virtue of the powers in me vested, do hereby make known and proclaim the acceptance of said act by the different bands of the Sioux Nation of Indians, and the consent thereto by them as required by the act, and said act is hereby declared to be in full force and effect, subject to all the provisions, conditions, limitations and restrictions, contained therein. . . . All persons will take notice of the provisions of said act, and of the conditions, limitations and restrictions therein contained, and be governed accordingly.

33. President Harrison's action issuing the 1890 Proclamation was *ultra vires* and contrary to law and in violation of the constitutional rights of the members of the Oglala Band.

34. Congress did not clearly and unequivocally express any intention by the 1889 Act to diminish or otherwise alter the boundaries of the Great Sioux Reservation. The 1889 Act contains no language of diminishment or alteration of the boundaries of the Great Sioux Reservation, and no language of cession of any territory or relinquishment or extinguishment of title to any lands of the Great Sioux Reservation, save release of title by members of one reservation to the other five smaller reservations.

35. Since 1890 up to and including the present, the Oglala Band and its successor, the Oglala Sioux Tribe, has protested the facts alleged above continuously, publicly and notoriously; has continuously, publicly and notoriously maintained that the boundaries of the Great Sioux Reservation were never diminished or otherwise altered by the 1889 Act; has continuously, publicly and notoriously maintained that it retains recognized aboriginal Indian title to all lands located therein; and has never acquiesced in any claim or assertion that said boundaries have been diminished or otherwise altered or that such title has been relinquished or extinguished.

36. Since 1890 up to and including the present, the United States has disregarded the said protestations by the Oglala Band and the Oglala Sioux Tribe in that, *inter alia*, the United States has denied the Band, the Tribe and its members, by force and threat of criminal prosecution, their right to use and occupy any lands, except lands within the Pine Ridge Reservation, within the balance of the Great Sioux Reservation, including all lands within the other five of the six smaller reservations conditionally created in sections 2 - 6 of the 1889 Act and nine million acres of lands conditionally "restored" to the pubic domain and opened to settlement in section 21 of the 1889 Act.

37. By the Flood Control Act of December 22, 1944, P.L. 534, ch. 665, 58 Stat. 887, Congress authorized the Missouri River Pick-Sloan Program ("Pick-Sloan Program" or "Program") and charged the Army Corps of Engineers with constructing six dam and reservoir projects on the main stem of the Missouri River under the Program. Thereafter, the Corps acquired approximately two million acres of land ("Pick-Sloan Project Lands") for the six dam and reservoir projects and constructed the projects. Four of the dams and reservoirs are located in South Dakota, within the Great Sioux Reservation: Oahe Dam and Lake Oahe, Big Bend Dam and Lake Sharpe, Fort Randall Dam and Lake Francis Case, and Lewis and Clark Dam and Lewis and Clark Lake ("South Dakota Pick-Sloan Projects"). In the case of Oahe Dam and Lake Oahe, the Corps acquired some land under an agreement between the United States and the Cheyenne River Sioux Tribe enacted by the Act of September 3, 1954, P.L. 776, 68 Stat. 1191 ("1954 Agreement"). In the case of the balance of the land around Oahe Dam and Lake Oahe and the other three dams and lakes of the South Dakota Pick-Sloan Projects, the Corps acquired land by condemnation or by mesne conveyances. The Oglala Sioux Tribe was not a party to the 1954 Agreement. Neither did the Corps join the Oglala Sioux Tribe as a party to any condemnation proceeding relating to, nor was the Oglala Sioux Tribe party to any mesne conveyance of, Pick-Sloan Project Lands within the Great Sioux Reservation.

38. The Corps subsequently constructed and has operated and maintained approximately 112 shoreline recreational areas in South Dakota around the shores of Lake Oahe, Lake Sharpe, Lake Francis Case and Lewis and Clark Lake. Of these 112 recreational areas, approximately 105 are located within the aboriginal territory of the Oglala Band.

39. By the Water Resources Development Act of August 17, 1999, P. L. 106-53, Title VI, §§ 601-609,113 Stat. 269, 385, *as amended by* the Water Resources Development Act of December 11, 2000, P. L. 106-541, Title V, § 540, 114 Stat. 2572, 2664 ("WRDA"), Congress directed the Secretary of the Army to transfer title or grant perpetual leases to recreational areas

and other lands around Lake Oahe, Lake Sharpe, Lake Francis Case and Lewis and Clark Lake to the State of South Dakota, the Cheyenne River Sioux Tribe and the Lower Brule Sioux Tribe on or before January 1, 2002. WRDA was enacted by Congress without public hearings and over the objections of the Oglala Sioux Tribe.

40. By section 605, subsections (a)(1)(A), (b) and (c) of the WRDA, Congress directed the Secretary of the Army to convey to the State of South Dakota by transfer or lease 91,178 acres of lands around the four reservoirs, including 73 recreational areas: 30 areas by transfer and 4 areas by lease around Lake Oahe, 8 areas by transfer around Lake Sharpe, 21 areas by transfer and 3 areas by lease around Lake Francis Case, and 6 areas by transfer and 1 area by lease around Lewis and Clarke Lake. Fifty-one recreational areas and other lands around Lake Oahe, Lake Sharpe and Lake Francis Case are located within Oglala aboriginal territory. Eighteen of such areas and other lands are located west of the Missouri River within the Great Sioux Reservation and 33 of such areas and other lands are located outside that reservation but within the fourteen million acre area east of the Missouri River referred to in paragraph 14(b), above. All of these recreational areas and other lands are the subject of this action.

41. The 7 recreational areas and other lands around Lewis and Clark Lake and 12 recreational areas and other lands on the east bank of Lake Francis Case were one time part of the aboriginal territory of the Oglala Band, but the Oglala Band and other bands of the Teton Division of the Sioux Nation voluntarily relinquished their right of exclusive use and occupancy of the area to the Yankton Division of the Sioux Nation more than a century prior to the 1825 Treaty, and are subject to the stewardship of the Yankton Sioux Tribe and are not the subject of this action.

42. By section 606, subsections (b) and (c) of the WRDA, Congress directed the Secretary of the Army to convey by transfer 6 recreational areas and other lands around Lake Oahe to the Cheyenne River Sioux Tribe, and 6 recreational areas and other lands by transfer

and 3 recreational areas by lease around Lake Sharpe, and other lands around Lake Francis Case, to the Lower Brule Sioux Tribe. These recreational areas and other lands are part of the aboriginal territory of the Oglala Band, but are within the Cheyenne River Indian Reservation, the Lower Brule Indian Reservation or the Crow Creek Indian Reservation, and are subject to the stewardship of the Cheyenne River Sioux Tribe and the Lower Brule Sioux Tribe and are not the subject of this action.

43. By section 3 of the Native American Graves Protection and Repatriation Act of November 16, 1990, P.L. 101-601, 104 Stat. 3048, 25 U.S.C. § 3002(a) ("NAGPRA"), Congress declared ownership or control of Native American human remains, associated and unassociated funerary objects, sacred objects and items of cultural patrimony ("Native American cultural items") excavated or discovered on federal or tribal lands after November 16, 1990 to be vested either in lineal descendants of the deceased or Indian tribes under a priority formula. Under this formula, except in the case of human remains and associated funerary objects where the lineal descendants of the deceased can be ascertained, ownership and control of Native American cultural items is vested in the Indian tribe which, upon notice, states a claims for such items and: 1) is the Indian tribe on whose tribal land such items were discovered, or if there is none, 2) is the Indian tribe with the closest cultural affiliation with such items, or if that cannot reasonably be ascertained, 3) is an Indian tribe able to prove a stronger cultural relationship to such items than the Indian tribe recognized as aboriginally occupying the area in which the objects were discovered by a final judgment of the Indian Claims Commission or Court of Federal Claims, or if such stronger relationship cannot be proven, 4) is the Indian tribe so recognized as aboriginally occupying the area.

44. On or about December 4, 2001, the Oglala Sioux Tribe notified the Army Corps pursuant to NAGPRA that it claims ownership and control of all Native American cultural items excavated or discovered, *inter alia*, at all of the recreational areas or other lands that are the

subject of this action, including, but not limited to, those Native American cultural items classified by the Army Corps as "Teton," "Sioux" or "Arikara."

45. By the National Historic Preservation Act of October 15, 1966, P.L. 89-665, 80 Stat. 915, *as amended*, 16 U.S.C. § 470 *et seq.* ("NHPA"), Congress provided for the establishment of the National Register of Historic Places ("National Register") and provided enforceable legal protection for all historic properties included in the National Register or eligible for inclusion. By section 110 of the NHPA, 16 U.S.C. § 470h-2(a)(2), each federal agency is required to establish a program for the identification, evaluation and nomination to the National Register of all historic properties, including all properties eligible for inclusion in the National Register, under the jurisdiction and control of such federal agency, and to ensure that such properties are identified, evaluated and nominated.

46. By section 605(h) of the WRDA, Congress provided that the NHPA shall continue to apply after transfer or lease to all lands to be transferred or leased to the State of South Dakota under section 605, the same as if the lands continued to be managed by the Army Corps. By section 607(a)(6)(A) of the WRDA, Congress provided that the authority of the Army Corps to enforce the provisions of the NHPA with respect to all lands to be transferred or leased to the State of South Dakota under section 605 would not be diminished as a result of such transfer or lease.

47. The recreational areas and other lands that are the subject of this action contain Native American cultural items and historic properties included or eligible to be included in the National Register, including human remains, associated and unassociated funerary objects, grave goods, sacred places and other items of cultural patrimony, prehistoric and historic village sites, ceremonial sites, structures, objects, artifacts, records and remains, and other properties, each of which is of traditional religious, cultural and historical importance to the Oglala Sioux Tribe and its members. At least four of these properties are included in the National Register,

and at least five of these properties have been determined by the Army Corps to be eligible for inclusion in the National Register but have not been nominated, including, but not limited to:

(a) Walth Bay Village within the Walth Bay Recreation Area, a well-known and well-documented earth-lodge village;

(b) Sewer Bay Plains Village within the Indian Creek Recreation Area, which contained human remains and was probably part of the now-inundated Larson Village;

(c) An early Archaic occupation near the Indian Creek Recreation Area boat ramp, which is has been recommended to be listed in the National Register;

(d) A Woodland-era village site within the North Point Recreation Area, which has been explored but never thoroughly studied; and

(e) A largely unexcavated village within the Spring-Cow Creek Recreation Area.

At least 43 other of these properties have been identified by the Army Corps as potentially eligible for inclusion in the National Register but have never been evaluated by the Army Corps or nominated for inclusion. In addition, at least five other of these properties have been identified by the South Dakota State Historic Preservation Officer ("SHPO") as potentially eligible for inclusion in the National Register but have never been evaluated by the Army Corps or nominated for inclusion. These five other properties have been specifically characterized by the South Dakota SHPO as being "Sioux" or "Siouan." The Army Corps has failed to perform any field assessment of these properties.

48. Defendants have failed to conduct field surveys to ascertain the current condition of known historic properties included or eligible for inclusion in the National Register within the recreational areas and other lands that are the subject of this action. For example, as early as the period 1979-1983, the Army Corps was notified by its contract archaeologists that cultural resources were being damaged and removed by recreational users. The Army Corps has taken

no adequate or effective measures to protect these properties. Many of the religious, cultural, and historical resources described in paragraph 47, above, were damaged or removed during the time they have been managed by the Army Corps, without the knowledge or consent of the Oglala Sioux Tribe. For example, the Walth Bay Village was reported in 1986 to be subject to continuing vandalism and disturbance from recreational visitors, and the village site within the Spring-Cow Creek Recreation Area was already deteriorating in 1979 from erosion and recreational use.

49. On February 8, 2002, Plaintiff duly filed Notices of Lis Pendens in accordance with Rule 64 of the Federal Rules of Civil Procedure, 28 U.S.C. § 1964 and the laws of the State of South Dakota, giving constructive notice of this action with respect to, *inter alia*, each of the recreational areas and other lands that are the subject of this action and within the boundaries of the Great Sioux Reservation. On the same date, Plaintiff duly filed Notices of Lis Pendens in accordance with Rule 64, 28 U.S.C. § 1964 and the laws of the State of South Dakota, giving constructive notice of this action with respect to, *inter alia*, each of the recreational areas and other lands that are the subject of this action within the fourteen million acre area east of the Missouri River referred to in paragraph 14(b), above, with the following exceptions: a Notice of Lis Pendens was duly presented for filing on said date to the Register of Deeds in Walworth County, South Dakota, within which 8 recreational areas and other lands that are the subject of this action are located, but the Register of Deeds wrongfully failed and refused to file such notice; and no Notice of Lis Pendens was filed in Campbell County, South Dakota, within which 6 recreational areas and other lands that are the subject of this action are located.

50. On or about February 8, 2002, Defendants purported to transfer or lease to the State of South Dakota some but not all of the recreational areas and other lands that are the subject of this action, some but not all of which are within the boundaries of the Great Sioux Reservation. On information and belief, at some future date Defendants intend to transfer or

lease to the State of South Dakota the balance of the recreational areas and other lands that are the subject of this action.

E. CLAIMS FOR RELIEF.

FIRST CLAIM FOR RELIEF

51. Plaintiff realleges the allegations contained in paragraphs 1-50, above.

52. The 1889 Act never became effective in accordance with section 28 of the said Act.

53. The 1889 Act did not operate to diminish or otherwise alter the boundaries of the Great Sioux Reservation.

54. No treaty or act of Congress subsequent to March 2, 1889 has ever diminished or otherwise altered the boundaries of the Great Sioux Reservation.

55. Defendants deny and continue to deny that the boundaries of the Great Sioux Reservation have never been diminished or otherwise altered by the 1889 Act or other subsequent treaty or act of Congress, and have failed and refused and continue to fail and refuse to acknowledge and abide by the legal relationship between the Oglala Sioux Tribe and Defendants established by the 1868 Fort Laramie Treaty with respect to the recreational areas and other lands that are the subject of this action and within the boundaries of the Great Sioux Reservation.

56. Plaintiff has suffered injury in fact to its legally-protected interests in the recreational areas and other lands that are the subject of this action and within the boundaries of the Great Sioux Reservation as a direct result of Defendants aforesaid actions, failures and refusals, and is likely to continue to suffer such injury, unless declaratory relief is granted by this Court.

SECOND CLAIM FOR RELIEF

57. Plaintiff realleges the allegations contained in paragraphs 1-56, above.

58. The recreational areas and other lands that are the subject of this action and within the boundaries of the Great Sioux Reservation are subject to the provisions of article 12 of the 1868 Fort Laramie Treaty.

59. Article 12 of the 1868 Fort Laramie Treaty prohibits Defendants from transferring or leasing to the State of South Dakota pursuant to section 605 of the WRDA the recreational areas or other lands that are the subject of this action and within the boundaries of the Great Sioux Reservation without the voluntary consent in accordance with article 12 of the 1868 Fort Laramie Treaty of each of the bands of the Sioux Nation signatory to the 1868 Fort Laramie Treaty, or their successors.

60. None of the bands of the Sioux Nation signatory to the 1868 Fort Laramie Treaty, or their successors, including the Oglala Sioux Tribe, have given their voluntary consent in accordance with article 12 of the 1868 Fort Laramie Treaty to the transfer or lease to the State of South Dakota pursuant to section 605 of the WRDA of the recreational areas and other lands that are the subject of this action and within the boundaries of the Great Sioux Reservation.

61. On or about February 8, 2002, Defendants purported to transfer or lease to the State of South Dakota certain recreational areas and other lands that are the subject of this action, and are likely to transfer or lease to the State of South Dakota the balance of the recreation areas and other lands that are the subject of this action, and within the boundaries of the Great Sioux Reservation, unless declaratory and injunctive relief is granted by this Court.

62. Plaintiff has suffered injury in fact to its legally-protected interests in the recreational areas and other lands that are the subject of this action and within the boundaries of the Great Sioux Reservation as a direct result of the aforesaid actions of Defendants, and is likely to continue to suffer such injury, and is likely to suffer further such injury as a direct result of the

aforesaid likely further actions of Defendants, unless declaratory and injunctive relief is granted by this Court.

THIRD CLAIM FOR RELIEF

63. Plaintiff realleges the allegations contained in paragraphs 1-62, above.

64. Defendants owe a trust responsibility to the Oglala Sioux Tribe under the 1825 Treaty, the 1851 Fort Laramie Treaty, the 1868 Fort Laramie Treaty and federal statutory and common law.

65. This trust responsibility, *inter alia*, requires Defendants to consult with and reasonably to accommodate the views of the Oglala Sioux Tribe prior to taking any significant actions regarding transfer, leasing or management of the recreational areas and other lands that are the subject of this action.

66. On or about February 8, 2002, Defendants purported to transfer or lease to the State of South Dakota certain recreational areas and other lands that are the subject of this action, having failed and refused to consult with and reasonably to accommodate the views of the Oglala Sioux Tribe prior to taking any significant actions regarding transfer, leasing or management of the recreational areas and other lands that are the subject of this action, and are likely to transfer or lease to the State of South Dakota the balance of the recreational areas and other lands that are the subject of this action, and are likely to continue to fail and refuse to consult with and reasonably to accommodate the views of the Oglala Sioux Tribe prior to taking any significant actions regarding transfer, leasing or management of the recreational areas and other lands that are the subject of this action, unless declaratory relief and relief in the nature of mandamus is granted by this Court

67. Plaintiff has suffered injury in fact to its legally-protected interests in the recreational areas and other lands that are the subject of this action as a direct result of the aforesaid

actions, failures and refusals of Defendants, and is likely to continue to suffer such injury, and is likely to suffer further such injury as a direct result of the aforesaid likely further actions and likely failures and refusals of Defendants, unless declaratory and injunctive relief is granted by this Court.

FOURTH CLAIM FOR RELIEF

68. Plaintiff realleges the allegations contained in paragraphs 1-67, above.

69. The National Historic Preservation Act of October 15, 1966, P.L. 89-665, § 110, 80 Stat. 915, *as amended*, 16 U.S.C. § 470h-2(a)(2), requires Defendant Army Corps of Engineers to locate, inventory and nominate for inclusion in the National Register of Historic Places all Native American cultural items and other historic properties within the recreational areas and other lands that are the subject of this action that appear to qualify for inclusion in the National Register.

70. Defendant Army Corps of Engineers has failed and refused and continues to fail and refuse to locate, inventory and nominate for inclusion in the National Register Native American cultural items and other historic properties within the recreational areas and other lands that are the subject of this action that appear to qualify for inclusion in the National Register.

71. Plaintiff has suffered injury in fact to its legally-protected interests in the Native American cultural items and other historic properties within the recreational areas and other lands that are the subject of this action as a direct result of the failure and refusal by Defendant Army Corps of Engineers to locate, inventory and nominate for inclusion in the National Register such Native American cultural items and other historic properties that appear to qualify for inclusion in the National Register, and is likely to continue to suffer such injury, unless relief in the nature of mandamus is granted by this Court.

F. PRAYER FOR RELIEF.

WHEREFORE, Plaintiff prays that this Court grant the following relief:

1. A Declaration pursuant to 28 U.S.C. § 2201 that the Act of March 2, 1889, ch. 405, 25 Stat. 888, never became effective by its terms in accordance with section 28 thereof; that the Act of March 2, 1889 did not operate to diminish or otherwise alter the boundaries of the Great Sioux Reservation as defined by article 2 of the Fort Laramie Treaty of April 29, 1868, United States-Sioux Nation, 15 Stat. 635; that subsequent to March 2, 1889 the boundaries of the Great Sioux Reservation have never be diminished or otherwise altered; and that each of the recreational areas and other lands that are the subject of this action and within the boundaries of the Great Sioux Reservation are subject to the provisions of article 12 of the 1868 Fort Laramie Treaty;

2. A Declaration pursuant to 28 U.S.C. § 2201 that the transfers and leases on or about February 8, 2002 by Defendants to the State of South Dakota of recreational areas and other lands that are the subject of this action and within the boundaries of the Great Sioux Reservation are without force or effect;

3. An Injunction prohibiting Defendants from transferring any recreational areas or other lands that are the subject of this action and within the boundaries of the Great Sioux Reservation to the State of South Dakota pursuant to the Water Resources Development Act of August 17, 1999, P.L. 106-53, Title VI, §§ 601-609, 13 Stat. 269, 385, *as amended*, without the voluntary consent of each of the bands of the Sioux Nation that were signatory to the 1868 Fort Laramie Treaty, or their successors, including the Oglala Sioux Tribe, obtained in the manner and form specified in article 12 of the 1868 Fort Laramie Treaty;

4. A Declaration pursuant to 28 U.S.C. § 2201 that Defendants are required to consult with and reasonably to accommodate the views of the Oglala Sioux Tribe prior to taking any

significant actions regarding transfer, leasing or management of the recreational areas and other lands that are the subject of this action;

5. Relief in the nature of mandamus requiring Defendants to consult with and reasonably to accommodate the views of the Oglala Sioux Tribe prior to taking any significant actions regarding transfer, leasing or management of the recreational areas and other lands that are the subject of this action;

6. Relief in the nature of mandamus requiring Defendant Army Corps of Engineers to locate, inventory and nominate for inclusion in the National Register of Historic Places in accordance with the National Historic Preservation Act of October 15, 1966, P.L. 89-665, § 110, 80 Stat. 915, *as amended*, 16 U.S.C. § 470h-2(a)(2), all Native American cultural items and other historic properties within the recreation areas and other lands that are the subject of this action that appear to qualify for inclusion in the National Register;

7. Reasonable attorney fees, expert witness fees and costs of suit under the Equal Access to Justice Act, 28 U.S.C. § 2412; and

8. Such other further relief as is just, proper and equitable under the circumstances.

Respectfully submitted this 8th day of September, 2003.

Patricia Marks, Esq

Patricia A. Marks, Esq.
U.S. District Court Bar # 446702
15992 A.E. Mullinix Road
Woodbine, Maryland 21797-8440
Tel: 1-410-489-4553
Fax: 1-301-854-5117
Email: Markspattyesq@aol.com

Mario Gonzalez, Esq.
South Dakota State Bar # 612 (2003)
LAW OFFICES OF MARIO GONZALEZ
522 7th Street, Suite 202
Rapid City, South Dakota 57701-2756
Tel: 1-605-716-6355
Fax: 1-605-716-6357
Email: Gnzlaw@aol.com

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing SECOND AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND RELIEF IN THE NATURE OF MANDAMUS was served by mailing, by U.S. Mail with first class postage prepaid thereon, and where indicated by facsimile transmission, on the following persons and addressed as follows this 8th day of September, 2003.

John H. Martin, Esq.
United States Department of Justice
Environmental and Natural Resources Division
Ben Franklin Station
P.O. Box 663
Washington, DC 20044-0663
and by facsimile to: 1-202-305-0238

Terry L. Pechota, Esq.
Pechota, Leach & Dewell, LLP
1617 Sheridan Lake Road
Rapid City, SD 57702-3483

Patricia A. Marks, Esq.
15992 A.E. Mullinix Road
Woodbine, Maryland 21797-8440
Tel: 1-410-489-4553
Fax: 1-301-854-5117
Email: Markspattyesq@aol.com

Attorney for Plaintiff