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Book Review

The Other Side of the Dam Story: A Review of *Coyote Warrior*¹

Stacey L. Gordon²

It was on one of these October hunts, in the wooded bottomlands between the dam and the mouth of the Knife River, that [Byron] Sneva first saw the Indian farms and villages. In his two years at the dam, he does not remember anyone ever discussing how The Flood might change the Indian's world.

"You didn't have to spend more than one winter there to know that nobody could survive that country on top. When I saw the lake for the first time, I was stunned. We destroyed hundreds of square miles of beautiful river bottomland. What a terrible thing. We gave them no choice."³

...and after a while Carl said, "There are parts of our culture that stink with phoniness. But we can do some wonderful things too. That dam [Grand Coulee Dam] is one of them. If our generation has anything good to offer history, it's that dam. Why, the thing is going to be completely useful. It's going to be a working pyramid. I just want to help build it."⁴

Though a generation and three states removed, my family's history in the West is the other side of the Cross family's story, but until I read *Coyote Warrior*, I did not think about there being another side. My mother's family is from central Washington, the heart of the Columbia Basin Federal

1. Paul VanDevelder, *Coyote Warrior* (Little, Brown & Co. 2004).

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3. VanDevelder, *supra*, n. 1, at 144. Byron Sneva was a civil engineer who worked at Garrison Dam for two years setting elevations for the diversion channels and calculating how much earth the bulldozers had to move. Though he hunted the bottomlands before they were flooded and saw the Mandan, Hidatsa and Arikara villages there, he did not see the finished dam or the lake behind it until he visited the site again in the 1960's. *Id.* at 143-44.

4. Murray Morgan, *The Dam: The Thrilling Story of Grand Coulee* xviii (Viking 1954).

Reclamation Project and the Grand Coulee Dam. My father is a civil engineer who specializes in water systems. Both my parents worked for the U.S. Bureau of Reclamation twenty years after Grand Coulee Dam was built on the Columbia River, flooding towns and villages behind it. My brother and sisters and I grew-up occasionally recreating on the lakes behind the Columbia River dams, and viewing dams as amazing examples of modern civil engineering. We have been on "dam" tours around the world and been awed by the tons of concrete, giant turbines and the beauty of the spillways lit at night.

Sometimes, at interpretive centers, we would see the pictures of villages and towns destroyed by the floods. I distinctly remember a photograph of tipis in a tribal village. The photo was black and white, but I still see it in color, a crisp, colorful fall day. The tipis stood beside a quiet river, and there was smoke rising from cooking fires, but there were no people. Somebody, one of my parents or maybe a tour guide, told me that the village was flooded by the waters that rose behind Grand Coulee Dam. I assumed they meant that spot of land was flooded but the people left and survived. Nobody ever told me the stories of what happened to the people. To be fair, I do not think my parents knew. I should have been more curious about that photograph before now; now I know the other side of the story. I still believe that dams are engineering marvels, but now I know the cost of damming the major rivers of the American West.

I do not think the interpretive centers told the legal and political story told in *Coyote Warrior*. The book is more than a biography and more than Western history. It is not much of a legal thriller because it is too sad, though you hope throughout that it ends right. The story has tragic elements, but heroic elements also. Above all, it is a powerful legal story that encompasses the development of Indian law and how the federal government has dealt with Indians in the legal arena. The complicated legal concepts of treaties and treaty obligations, tribes as sovereign dependent nations, federalism, federal trusteeship, allotment, plenary power, termination, and 5th Amendment takings are discussed honestly and made accessible.

Coyote Warrior is a book all Western lawyers should read for the law it teaches and the wise words behind the lessons. VanDevelder does not pull any punches in his discussions of law and politics and the people involved. He not only expertly discusses the law, but through his extensive research also reveals some of the personalities and politics behind the legal text. Of course, the legal story is more compelling – and more devastating – when you add in the people.

The legal issues are interesting and difficult. Although they managed to do it, the federal government had some big legal hurdles to surmount before they could take the Mandan-Hidatsa-Arikara⁵ land. The tribes should have

5. The Three Affiliated Tribes.

been protected by treaties and their status as sovereign dependent nations. Chief Justice John Marshall's "Marshall Trilogy" of cases⁶ established the "domestic dependent nation"⁷ status of tribes and the federal trusteeship over them: tribes are simultaneously sovereign nations with whom the federal government (instead of state governments or other foreign governments) must establish relationship by treaty, and under the trusteeship of Congress, who, as trustee must manage tribal resources for the best interests of the tribes.

VanDevelder devotes an early chapter to the story of the 1851 peace council at Horse Creek, often referred to as The Miracle at Horse Creek. Twelve thousand Indians from ten tribes came together at Horse Creek with representatives from the U.S. government in a peace council that ended with the signing of the Treaty of Horse Creek⁸ between the U.S. government and the Mandan, Hidatsa, Arikara, Assinaboin, Sioux, Cheyenne, Shoshone, Arapaho, Gros Ventre, and Crow tribes. The treaty established boundaries between tribal territories and provided that the U.S. government would pay each tribe \$50,000 each year for 50 years⁹ as compensation for peace, safe travel for white settlers across Indian territory, and military outposts to enforce that agreement.¹⁰ The U.S. government also "promised to honor the new boundaries of their tribal territories as defined by the treaty: white settlers would be prohibited from settling in those territories for 'as long as the rivers shall flow.'"¹¹ The Dawes Act¹² broke that promise and by 1885 tribal families were farming private allotments.¹³

Then, in 1944, Congress passed the Flood Control Act of 1944¹⁴ which would provide both flood control (ironic considering the devastating flood caused by the construction of Garrison Dam) on the Lower Missouri River and other rivers, as well as irrigation water for farmers who had survived

6. *Johnson v. McIntosh*, 21 U.S. 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); *Worcester v. Georgia*, 31 U.S. 515 (1832). "Three bedrock principles underlie *Worcester* and the earlier decisions: (1) by virtue of aboriginal, political and territorial status, Indian tribes possessed certain incidents of preexisting sovereignty; (2) this sovereignty was subject to diminution or elimination by the United States, but not by the individual states; and (3) the tribes' limited inherent sovereignty and their corresponding dependency upon the United States for protection imposed on the latter a trust responsibility." Conference of Western Attorneys General, *American Indian Law Deskbook* 5 (Clay Smith ed., 3rd ed., U. Press of Colo. 2004).

7. *Cherokee Nation*, 30 U.S. at 17.

8. *Treaty of Fort Laramie with Sioux, etc.* (Sept. 17, 1851), *Indian Treaties, 1778-1883* at 594 (Charles J. Kappler ed., Interland Publ. Co. 1972).

9. This was changed to 10 years before the treaty was ratified. VanDevelder, *supra*, n. 1, at 73.

10. *Id.* at 57-77.

11. *Id.* at 72.

12. *General Allotment Act of 1887*, 24 Stat. 388 (1887). The Dawes Act allotted specific parcels of land to tribal members. After a 25-year period in which the government held the land in trust, the land was conveyed to tribal members in fee simple. Those lands could then be sold and as a result, land that was once held in trust for the tribes was sold to non-Indian settlers. Remaining un-allotted parcels were also sold to homesteaders. Conference of Western Attorneys General, *American Indian Law Deskbook* at 27-31. [*supra*] This created a distinction between allotted fee lands and trust lands on the reservation.

13. VanDevelder, *supra*, n. 1, at 77.

14. *Flood Control Act of 1944*, Pub. L. No. 78-534, 58 Stat. 887 (1944).

the Depression and the dust bowl years. Only after the Flood Control Act was passed did Congress realize that this solution would create a six-hundred-square-mile lake over the Mandan, Hidatsa and Arikara homeland.¹⁵

Congress was faced with a dilemma:

In the federal government's solemn trust relationship with the tribes, who exactly held title to treaty-protected Indian lands on the Upper Missouri River? And if Congress, the trustee, decides to take that land away under eminent domain in violation of its solemn 'supreme law of the land' treaty pledges to the tribes, how does the government legally square that with its constitutional obligations to the Indians?¹⁶

As VanDevellder recounts, Congress' solution was both dishonorable and sad.

Congress solved the constitutional problem it had with taking treaty-protected trust land by pretending the distinction between allotted lands, which were subject to constitutional taking, and trust lands, which were protected by treaty, didn't exist.

Without risking the liability of actually spelling out its dirty little legal problem, Congress had made its decision. Lawmakers would simply lift their eyes above the troubling distinction between trust lands and allotted lands, and pretend the former was the latter in order to wiggle out of its overarching treaty obligations as a trustee to the tribes. Rather than sending in the cavalry, Congress had learned that it could exert its will in Indian Country simply by passing new statutes. Incidents such as Wounded Knee and the Sand Creek Massacre had put up a foul odor that lingered over federal Indian policy for decades. A hundred years from now, who would know the difference between, or remember the cause and effect of a simple statute?¹⁷

As part of the War Department Civil Appropriation Act,¹⁸ Congress provided a payment of \$5,105,625 for "acquisition of the lands and rights therein within the taking line of Garrison Reservoir which lands lie within the area now established as the Fort Berthold Indian Reservation, North Dakota, including all elements of value above or below the surface thereof and including all improvement, severance damages and reestablishment and

15. VanDevellder, *supra*, n. 1, at 28.

16. *Id.* at 97-98.

17. VanDevellder, *supra*, n. 1, at 127-28.

18. Pub. L. No. 80-296, 61 Stat. 686 (1947).

relocation costs ...”¹⁹ The \$5 million was supposed to justly compensate the Three Affiliated Tribes for the land as well as cover relocation and reconstruction expenses, even though Congress had previously valued the land alone at \$21 million.²⁰ Feeling like they had no choice, members of the Three Affiliated Tribes accepted Congress’ “offer” by a vote in May, 1948.²¹ At least, the Chairman felt, they were guaranteed grazing rights and hunting and fishing rights as well as mineral rights.²²

But the rights guaranteed in the 1947 Civil Appropriations Act did not survive in the final takings act.²³ The final act provided for compensation of approximately \$12.5 million, still well below even just the monetary value of the land, but “[t]he best parts had gone missing. The tribes’ fishing and hunting rights, the promise of discounted power, and the guarantee of irrigation and of perpetual grazing and mineral rights in the taking area were quietly stripped from the bill.”²⁴ Furthermore, the members of the Three Affiliated Tribes no longer had any claims for violation of the Treaty of Horse Creek,²⁵ even though those claims had technically been ignored and never addressed.

Thirty-five years later, life on the Fort Berthold Indian Reservation was desperate.

Morale in tribal government had reached a new low. Nobody trusted the elected leaders. The tribal membership had grown to 5,500, but those statistics masked the darkness of high noon. Tribal members could no longer visualize a future for their children. The unemployment rate at Fort Berthold had risen to 85 percent. Four out of five school-aged children were malnourished. Infant mortality rates were quadruple the national average. Life expectancy for men had dropped below fifty years. Moreover, soaring rates of alcoholism and drug addiction among the tribes’ youth had created a social climate of helplessness.²⁶

Then, in 1984, Congress unknowingly opened the door for the Three Affiliated Tribes to contest the compensation they were awarded in the 1949 taking of their homeland. In an effort to restart stalled irrigation projects, Congress established the Garrison Diversion Unit Commission (GDUC). At the Commission’s hearing in Bismark, North Dakota, tribal attorney,

19. *Id.* at 690.

20. VanDevellder, *supra*, n. 1, at 129.

21. *Id.* at 132.

22. *Id.*

23. Pub. L. No. 81-437, 63 Stat. 1026 (1949).

24. VanDevellder, *supra*, n. 1, at 134.

25. *Id.*

26. *Id.* at 190-91.

Raymond Cross, argued that it was time for Congress to make good on their promises.²⁷

“The fact is,” Cross concluded, “the Three Affiliated Tribes bore the brunt of the social and economic costs imposed on discrete groups for the development of these multipurpose projects that benefited the United States as a whole. Very little account has been taken of the water development needs of the Indian tribes, developments that were promised and never delivered.”²⁸

Cross’ testimony reopened the entire takings issue and finally, in 1992 Congress approved an award of \$149.2 million²⁹ to the Three Affiliated Tribes “for the unjust taking of their reservation by an illegal act of Congress in 1949.”³⁰ Six years later, in 1998, the Three Affiliated Tribes finally started receiving the funds.³¹

There have been two developments in the story since *Coyote Warrior* was published. On December 3, 2004, President Bush signed the Three Affiliated Tribes Health Facility Compensation Act,³² which appropriates \$20 million to finally build a health care facility to replace the Elbowoods hospital, which was destroyed in The Flood. Significantly, the Senate Report accompanying the bill states:

C. Emerson Murry, former Chairman of the JTAC [Joint Tribal Advisory Committee], testified before the Committee in 1991 that “many assurances were given expressly or by implication by various federal officials that the problems anticipated by the Indians would be remedied,” yet many of the promises were never fulfilled.

Since that time, Congress has acted on several, but not all, of the recommendations contained in the JTAC report. The Equitable Compensation Act authorized a recovery fund to return to the tribe the Four Bears area of the reservation, among other things. However, no funding or authorization was provided to replace lost infrastructure. Accordingly, recommendations relating to the replacement or reconstruc-

27. *Id.* at 208.

28. *Id.*

29. *Three Affiliated Tribes and Standing Rock Sioux Tribe Equitable Compensation Act*, Pub. L. No. 102-575, tit. XXXV, 106 Stat. 4600, 4731 (1992).

30. VanDevellder, *supra*, n. 1, at 238.

31. *Id.* at 241.

32. Pub. L. No. 108-437, 118 Stat. 2623 (2004).

tion of infrastructure, particularly the health facility, remain unfulfilled.³³

The JTAC, formed as a result of Raymond Cross' testimony before the GDUC in 1984, recognized the need for this facility almost 20 years ago. "In its Final Report of May 23, 1986, the JTAC concluded that the tribe was entitled to the replacement of lost infrastructure, including the health facility which the JTAC found to be an 'urgent and critical need.'"³⁴

On January 4, 2005, the opening day of the 109th Congress, South Dakota Representative, Stephanie Herseth, introduced the Tribal Parity Act.³⁵ This bill would provide fair compensation to the Lower Brule and Crow Creek Sioux Tribes for losses they suffered as a result of the Flood Control Act of 1944. As introduced, the bill states:

3) the Fort Randall and Big Bend projects inundated the fertile bottom land of the Lower Brule and Crow Creek Sioux Tribes, which greatly damaged the economy and cultural resources of the Tribes;

(4) Congress has provided compensation to several Indian tribes, including the Lower Brule and Crow Creek Sioux Tribes, that border the Missouri River and suffered injury as a result of 1 or more Pick-Sloan Projects;

(5) the compensation provided to those Indian tribes has not been consistent;

(6) Missouri River Indian tribes that suffered injury as a result of 1 or more Pick-Sloan Projects should be adequately compensated for those injuries, and that compensation should be consistent among the Tribes; and

(7) the Lower Brule Sioux Tribe and the Crow Creek Sioux Tribe, based on methodology determined appropriate by the General Accounting Office, are entitled to receive additional compensation for injuries described in paragraph (6), so as to provide parity among compensation received by all Missouri River Indian tribes.

The Lower Brule Sioux Tribe would be awarded an additional \$147.5 million,³⁶ and the Crow Creek Sioux Tribe would receive an additional \$78.5 million.³⁷

33. Sen. Rpt. 108-165 at 2 (Oct. 15, 2003)

34. *Id.* (citing Sen. Rpt. 102-250 at 6 (Nov. 26, 1991)).

35. H.R. 109, 109th Congress (Jan. 4, 2005). Bill text and status is available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:h.r.00109:>.

36. H.R. 109, 109th Cong. § 3 (Jan. 4, 2005).

37. *Id.* at § 4.

Even if viewed only as a series of treaties and statutes and hearings, the legal story would be difficult to summarize. VanDevelder goes far beyond summarizing though, and recounts the legal events so that they appear in their real context. He tells the legal story through the words of the participants and details in the historical record. But *Coyote Warrior* is not just the legal story of misguided policy and the legislation crafted to implement it; it is the story of the Cross family and how Martin Cross, and later his son, Raymond Cross, fought in Washington for their family and their tribe. As tribal chairman, Martin Cross fought political battles with the federal government including the fight to prevent the dam from ever being built. Raymond Cross later fought important legal battles, including the fight to win a more equitable compensation. VanDevelder tells the Cross family's story -- and the larger human story -- through the poignant and wise words of the Cross family.

Phyllis [the eldest Cross daughter] has spent a lifetime thinking about The Flood and its consequences. In her own family, for example, decades passed before her parents and siblings were willing to talk.

"I've come to the conclusion that our thinking failed us. Our thinking failed us because suddenly our landmarks, our social and physical landmarks, the framework for everything we were was gone. Our identity derived from our villages. Those were destroyed. We were born into very dynamic and complex social networks that connected those identities across forty generations. Those went when the villages went."

...

"We went from being a deeply integrated family and community in July 1954 to being a society of totally isolated individuals who went into social free fall for the next fifty years. This happened to thousands of people simultaneously."

...

"The more we studied trauma, the more clearly we saw how it was being passed on to the next generation. How do you bury the past when your identity is trapped in its lasting effects. What do you call your life as a community, as a people, when despair is the only emotion you can trust?"³⁸

38. VanDevelder, *supra*, n. 1, at 32-33.

Byron Sneva was correct: the Mandan, Hidatsa and Arikara tribes did not survive life on top unscathed and the land and the life they lost in The Flood behind Garrison Dam can never be replaced. Nevertheless, *Coyote Warrior* and the part of the Cross family's story it tells ends in strength. Raymond Cross is a respected legal warrior with wisdom, humility, determination, intellectual power, and legal knowledge. In the end it is clear that Indian law fights still remain and that Raymond Cross is not done fighting. As somebody from the other side of the story, I found it heartening that Raymond Cross, whose office is down the hall from mine, is now fighting for the salmon and the treaty rights on the Columbia.

