

**HEARING ON OVERSIGHT OF THE ARMY CORPS'  
REGULATION OF SURPLUS WATER AND THE  
ROLE OF STATES' RIGHTS**

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**HEARING**

BEFORE THE

SUBCOMMITTEE ON SUPERFUND, WASTE  
MANAGEMENT, AND REGULATORY OVERSIGHT  
OF THE

COMMITTEE ON  
ENVIRONMENT AND PUBLIC WORKS  
UNITED STATES SENATE  
ONE HUNDRED FIFTEENTH CONGRESS

SECOND SESSION

—————  
JUNE 13, 2018  
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COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

ONE HUNDRED FIFTEENTH CONGRESS  
SECOND SESSION

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**HEARING ON OVERSIGHT OF THE ARMY  
CORPS' REGULATION OF SURPLUS WATER  
AND THE ROLE OF STATES' RIGHTS**

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**WEDNESDAY, JUNE 13, 2018**

U.S. SENATE,  
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,  
SUBCOMMITTEE ON SUPERFUND, WASTE MANAGEMENT,  
AND REGULATORY OVERSIGHT,  
*Washington, DC.*

The committee met, pursuant to notice, at 3:15 p.m. in room 406, Dirksen Senate Office Building, Hon. Mike Rounds (chairman of the subcommittee) presiding.

Present: Senators Rounds, Booker, Ernst, and Van Hollen.

**OPENING STATEMENT OF HON. MIKE ROUNDS,  
U.S. SENATOR FROM THE STATE OF SOUTH DAKOTA**

Senator ROUNDS. Good afternoon. The Environment and Public Works Subcommittee on Superfund, Waste Management, and Regulatory Oversight is meeting today to conduct a hearing entitled Oversight of the Army Corps' Regulation of Surplus Water and the Role of States' Rights.

Today we are meeting to hear directly from stakeholders impacted by the regulatory decisions made by the U.S. Army Corps of Engineers. Their testimony will provide the subcommittee an opportunity to consider legislative changes available to Congress, as well as the on-the-ground, real-world consequences of decisions made by the Army Corps and their effect on States and municipalities.

Section 6 of the Flood Control Act of 1944 authorizes the Army Corps to make available to States, municipalities, and other entities surplus water stored in Army Corps reservoirs for municipal and industrial uses. The Flood Control Act also highlights the pre-eminent role of States and localities with regard to water rights, going so far as to State that it is the policy of Congress to recognize the primary responsibilities of States and local interests with regard to water supply.

In December 2016, in the waning days of the previous Administration, the Army Corps published in the Federal Register a Notice of Proposed Rulemaking entitled Use of U.S. Army Corps of Engineers Reservoir Projects for Domestic, Municipal, and Industrial Water Supply. This rulemaking sought to define, "key terms" in the Flood Control Act of 1944 and the Water Supply Act of 1958.

One of the key terms targeted by the proposed rule is surplus water. Surplus water appears undefined in Section 6 of the Flood Control Act. In the multi-decade period since the passage of the Flood Control Act, with the exception of the previous Administration, the Corps has declined to define surplus water. In formulating the proposed rule, the Army Corps failed to take into account natural flows of the river system when defining surplus water.

Congress clearly intended to recognize and reaffirm the constitutionally protected rights of States to the natural flow of water through these river systems. The proposed rule is an attack on these States' rights and the States' ability to access these natural flows.

In the case of my home State of South Dakota, we live with a permanent flood, as thousands of acres of productive farmland have been inundated to create the mainstem dams of the Missouri River. Last month, I was joined, in a letter, by South Dakota Governor Dauggaard, Senator Thune, and Representative Noem, in which we stated that 500,000 acres of our most fertile river bottomlands were permanently flooded as the reservoirs filled following the construction of these dams. South Dakota citizens and tribal members were forced from their homes and communities.

No one doubts the benefits of multiuse Army Corps projects. But they need to be taken into proper historical context.

In taking such an expansive view of what constitutes surplus water and, thus, subject to Federal control, the Army Corps clearly does not recognize the constitutionally protected rights of States to the natural flows of the river system. Instead, the Army Corps is attempting to produce a system in which legitimate municipal and industrial projects cannot gain access to the water passing through the States by refusing to grant easements to gain access to these water resources.

The Army Corps is currently creating barriers to legitimate water uses. Earlier this year, when South Dakota's Game, Fish, and Parks Department requested access to an exceptionally small quantity of water from the Missouri River to construct a parking lot on government property adjacent to the reservoir, the Army Corps denied the request on the basis that this deeply flawed rule-making had yet to be finalized.

We all agree that the Army Corps has a legal right to regulate the use of water for authorized purposes, such as flood control and hydropower generation. I am not seeking to divert any water away from congressionally authorized purposes. What I am concerned with, however, is the notion that the people do not have a right to access the water passing through their States outside of well-defined purposes authorized by Congress.

Blocking access to such an important resource is in direct conflict with congressional intent. Preventing States from accessing the water they are entitled to is an attack on our Federalist system of government.

I want to be clear. It was never the intention of Congress to Federalize all of the water in our Country's major rivers. Any rule-making to the contrary is an attack on the States' rights and an unlawful taking by the Federal Government.

My hope is that today's hearing will shed light on this issue and motivate the Army Corps to consider promulgating rules more consistent with congressional intent and the water rights of States. This also includes a review and discussion of the existing practice of the Army Corps denying access across their take land for legitimate purposes by the States and other approved users.

Now I would like to recognize Senator Booker for his 5 minute opening statement.

Senator BOOKER.

**OPENING STATEMENT OF HON. CORY A. BOOKER,  
U.S. SENATOR FROM THE STATE OF NEW JERSEY**

Senator BOOKER. Mr. Chairman, I have here my opening statement, which is nothing short of scintillating and also very moving.

Senator ROUNDS. I would expect nothing less.

Senator BOOKER. Yes. The time is short, though, sir. I am just going to submit it for the record.

Senator ROUNDS. Without objection.

Senator BOOKER. And I will pass out copies at the back for those of you who would like to read it right now.

Senator ROUNDS. Thank you, Senator Booker.

Our witnesses joining us for today's hearing are Steve Pirner, Secretary of the South Dakota Department of Environment and Natural Resources; Ward Scott, Policy Advisor, Western Governors' Association; Stephen Mulligan, Legislative Attorney, congressional Research Service.

I want to thank you all for being here and I would, at this point, turn to our first witness, Secretary Pirner, for 5 minutes.

I can't say enough, and I am just going to do this as a special introduction. Secretary Pirner was the secretary of Water and Natural Resources when I was Governor. He was secretary before I became Governor. He has been one of the stellar individuals with regard to his knowledge, his interest, and his intensity in making sure that we have clean air, clean water, and that we understand the relationship between the Federal and State government.

I know he is irritated every time I ask him to come to Washington, DC.; he would rather be along the shores of the Missouri River and pier, particularly in the summertime, but I most certainly appreciate your participation in this hearing today. So, with that, Secretary Pirner, please proceed.

**STATEMENT OF HON. STEVEN M. PIRNER, SOUTH DAKOTA  
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES**

Mr. PIRNER. Thank you very much, Senator Rounds.

Ranking Member Booker and members of the Committee, my name is Steve Pirner, Secretary of the South Dakota Department of Environment and Natural Resources.

You all have heard about the waters of the U.S. rule proposed by EPA. Many labeled that rule as the largest Federal takeover of our Nation's water resources ever attempted. However, the water supply rule proposed by the Corps of Engineers exceeds that Federal takeover action, at least as it impacts the Missouri River in South Dakota.

Our issues with the proposed water supply rule began in 2008. That was when the Corps issued Real Estate Guidance Policy No. 26. This policy requires municipal and industrial water users to acquire a water storage contract prior to the Corps issuing an access easement for a pump site.

But the Corps had no process for issuing the contracts. Therefore, the effect of the policy was to place a moratorium on easements to our Missouri River, our largest and most reliable surface water supply in the State.

To advance the process, the Corps developed the proposed water supply rule. Under the rule, the Corps considered stored water, which is part of the surplus water, as being all the water in the reservoirs. This creates a monumental change in the law and steals South Dakota's rights to natural flows that, by tradition and law, are under the jurisdiction of the States.

To better understand natural flows, visualize our Missouri River reservoirs with their stored water sitting on top of the river, with natural flow flowing underneath. That natural flow represents water that has traditionally been under the jurisdiction of the State.

States' rights to natural flows of navigable waters within their borders are constitutionally founded and protected in the equal footing doctrine and Section 1 of the 1944 Flood Control Act. We believe no other Federal law usurps these rights.

Another concern is equity. The Corps has documented the tremendous benefits that reservoirs supply to people throughout the basin. Yet, in this rule the Corps applies fees to just the upstream States.

To require the upstream States, who already have paid so much, to pay the cost through fees, with people in the downstream States enjoying those benefits at no cost, is not fair or equitable. As Governor Dauggaard wrote to the Corps in 2012, to impose all reservoir operation and maintenance costs on upstream States alone adds insult to injury.

We have about 1,000 miles of Missouri River shoreline in South Dakota, but only about 100 miles are on the two short, free-flowing stretches in the State; the rest border the Corps reservoirs. Therefore, 90 percent of our shoreline is off limits to potential users of Missouri River water due to the Corps' moratorium and the proposed water supply rule.

Midland Contracting was one of the first to find this out when the Corps told them they could no longer pump water use for dust control out of the lake behind Big Ben Dam. The amount of water used from this reservoir, that is 80 miles long, covers 63,000 acres, was miniscule at best. The Corps has held fast to this moratorium, refusing to let a contractor pump water in 2011, even while flood waters were devastating Pierre, Ft. Pierre, and downstream communities.

Another example is the city of Pierre. They have been denied access for several years to the river, which runs right alongside the city, to install a small pumping station that would allow the city to irrigate green space with river water, saving time and money.

This moratorium remains in place today, as evidenced by the Corps response to our issuance of a temporary water right permit

to a contractor on March 19th, 2018, to use 90,000 gallons of Missouri River water out of the Oahe Reservoir. Oahe holds 6.4 trillion gallons. The Corps' response to this use of 0.000001 percent of Oahe water was "All requests for using water from South Dakota reservoirs are on hold until finalized guidance is received from headquarters. An alternate source of water should be utilized." All of these uses of water were approved by the State through our State water rights program. More detailed objections to the proposed rulemaking have been submitted by Governor Dauggaard, and I have enclosed those copies of his letters for your information.

However, the bottom line is the Corps is attempting a Federal takeover of the Missouri River water in South Dakota. This rule-making effort tramples States' rights and needs to be stopped now, before the Corps finalizes the rule in September. The future of South Dakota, I believe, is linked directly to having a Missouri River water supply that we manage as a State. Please do not let the Corps take that away from us.

We ask for your help in stopping the rulemaking in the name of the equal footing doctrine, cooperative federalism, and protecting States' rights under the 1944 Flood Control Act.

Thank you, Senator, for the invitation to appear here today.

[The prepared statement of Mr. Pirner follows:]

Testimony of Steven Pirner, PE  
Secretary, South Dakota Department of Environment and Natural Resources  
to the  
US Senate Subcommittee on Superfund, Waste Management and Regulatory Oversight

**“Oversight of the Army Corps’ Regulation of Surplus Water and  
the Role of States’ Rights”**

June 13, 2018  
Washington, D.C.

Chairman Rounds, Ranking Member Booker, and Members of the Committee, my name is Steve Pirner, Secretary of the South Dakota Department of Environment and Natural Resources (DENR). You all have heard about the Waters of the U.S. rule proposed by the U.S. Environmental Protection Agency (EPA). Many labeled that rule as the largest federal takeover of our nation’s water resources ever attempted. However, the Water Supply Rule proposed by the U.S. Army Corps of Engineers (Corps) for the Missouri River reservoirs exceeds that federal takeover action, at least in South Dakota.

The Missouri River is the largest, most reliable surface water supply in South Dakota. As such, it is extremely important to the state. In the 1950s and 60s, the federal government built four massive dams in South Dakota on the Missouri River, but we paid a heavy price. Environmentally, these reservoirs flooded more than 500,000 acres of our most fertile river bottomlands, never to be seen again. Socially, the dams disrupted people, forcing citizens and tribal members from their lands, homes, and communities. The promise of federal irrigation projects to help offset those losses never materialized.

The proposed Water Supply Rule began in 2008 when the Assistant Secretary of the Army issued Real Estate Guidance Policy Letter No. 26. This policy requires municipal and industrial water users to acquire a water storage contract prior to the Corps issuing an access easement to a Missouri River reservoir for a pump site, but the Corps had no process for issuing the contracts. Therefore, the effect of the policy was to place a moratorium on easements to the reservoirs.

To advance the process, the Corps developed the proposed Water Supply Rule. Under the rule, the Corps defines stored water as being all the water in the reservoirs. This new definition creates a monumental change to the law and steals South Dakota's rights to natural flows that, by tradition and law, are under the jurisdiction of the states. To better understand natural flows, visualize the reservoirs of stored water sitting on top of a river with natural flow passing underneath; this natural flow represents water under the jurisdiction of the state.

States' rights to natural flows of navigable waters within their borders are constitutionally founded, and protected, in the Equal Footing Doctrine. Congress acknowledged this states' right in the first sentence of Section 1 of the 1944 Flood Control Act by stating "*...it is 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,...*" No other federal law usurps this policy. As a consequence of the doctrine and the enacted law, the Corps must acknowledge the state's right to natural flows, but its definition of stored water does the opposite.

Another concern with the Corps' rule is one of equity. The Corps has documented the tremendous benefits the reservoirs supply to people throughout the basin, yet in the rule the Corps applies fees to just the upstream states. To require the upstream states to pay the cost through stored water fees with people in the downstream states enjoying these benefits at no cost is not fair or equitable. As Governor Daugaard wrote to the Corps in 2012, "*To impose all reservoir operation and maintenance costs on upstream states alone adds insult to (that) injury.*"

Taken together, the moratorium on easement access and proposed Water Supply Rule has deprived South Dakota of its Missouri River water because out of a thousand miles of Missouri River shoreline, only about one hundred miles are on the two short free-flowing stretches in the state. Therefore, ninety percent of our shoreline is off-limits to potential users of Missouri River water.

Midland Contracting was one of the first to find this out when the Corps told them they could no longer pump water used for dust control out of the lake behind Big Bend Dam. The amount of water to be used from this reservoir that is 80 miles long and covers 63,000 acres was miniscule at best. The Corps has held fast to this moratorium, refusing to let a contractor pump water in 2011 even while flood waters were devastating Pierre, Ft. Pierre, and downstream communities. The city of Pierre has been denied access for several years to the river to install a small pumping station that would allow the city to irrigate green space with river water, saving time and money. This moratorium remains in place today, as evidenced by the Corps' response to our issuance of a temporary water right permit to a contractor on March 19, 2018, to use 90,000 gallons of Missouri River water out of the Oahe Reservoir to redo a state parking lot just above Oahe Dam. Oahe holds 6.4 trillion gallons. The Corps' response to this use of 0.000001 percent of Oahe water was, *"All requests for using water from the South Dakota reservoirs are on hold until finalized guidance is received from Headquarters. An alternate source of water should be utilized."* All of these actions by the Corps denying use of water already approved by the state are nonsensical at best.

More detailed objections to the proposed rulemaking have been submitted by Governor Dugaard, and I have enclosed copies of his letters for your information. However, the bottom line is the Corps is attempting a federal takeover of the Missouri River water in South Dakota. This 2008 rulemaking effort tramples state's rights and needs to be stopped now before the Corps finalizes the rule in September. The future of South Dakota is linked directly to having a Missouri River water supply we can manage. Please do not let the Corps take that away from us. We ask for your help in stopping the rulemaking in the name of the Constitutional Equal Footing Doctrine, cooperative federalism, and protecting state's rights under the 1944 Flood Control Act.

Thank you again for the invitation.

Enclosed: Letters from Governor Dennis Dugaard

Senator ROUNDS. Thank you for your testimony, Secretary Pirner.

We will now turn to our second witness, Ward Scott.  
Mr. Scott, you may begin.

**STATEMENT OF WARD J. SCOTT,  
WESTERN GOVERNORS' ASSOCIATION**

Mr. SCOTT. Chairman Rounds, Ranking Member Booker, and members of the Subcommittee, I appreciate this opportunity to testify today on behalf of the Western Governors' Association. My name is Ward Scott and I am a policy advisor with WGA, where my work focused on western water policy and State-Federal relations.

Western Governors have consistently expressed their concern to the Corps regarding its December 2016 proposed rule. These concerns have focused on three primary elements: first, the proposed rule would likely have preemptive effects on States' sovereign authority over water resources and corresponding State laws; second, the Corps' overly broad proposed definition of the term surplus waters includes natural historic river flows, which should remain under State jurisdiction; and, third, the Corps has not adequately consulted with potentially affected States, nor has it properly assessed potential federalism implications, as required by Executive Order 13132, in its development of the proposed rule.

Water is precious everywhere, but especially in the West, where consistently arid conditions, diverse landscapes and ecosystems, and growing populations present unique challenges in the allocation and management of scarce water resources.

State water laws have developed over the course of decades, and very greatly do account for local hydrology; the interplay between Tribal, State, and Federal legal rights; and complicated systems of water allocation. These State laws and the regulatory frameworks within which they operate must be accounted for in the development of any Corps rule.

Western Governors have adopted a bipartisan policy that articulates a fundamental principle recognized by both Congress and the U.S. Supreme Court, which is that States are the primary authority for allocating, administering, protecting, and developing water resources, and they are primarily responsible for water supply planning within their boundaries.

This well-established State authority is rooted in the U.S. Constitution as States, upon their admission to the Union, established their sovereign authority over water resources under the equal footing doctrine and continue to maintain this broad authority unless preempted by Federal law.

Under the proposed rule, the Corps would define surplus water to mean any water available at a Corps reservoir that is not required during a specified time period to accomplish a federally authorized purpose of that reservoir. This definition fails to distinguish between surplus water, which is defined in relation to storage and authorized purposes, and natural flow, which is defined as waters that would have been available for use in the absence of Federal dams and reservoirs.

In its Notice of Proposed Rulemaking, the Corps does not claim that its authorizing statutes, or any other relevant Federal statute, preempts State authority over a river's natural flows. Rather, both the Flood Control Act of 1944 and the Water Supply Act of 1958 clearly direct the Corps to recognize and defer to State law. Nor have States transferred or ceded to the Corps any rights to or authority over the allocation and management of natural flows.

The Corps' proposed definition of surplus water is beyond the scope of its statutory authority and would usurp States' well-established rights over the natural flows of water through Corps reservoirs. As a result, the proposed rule would conflict with Congress's clear intent to preserve State water law and authority.

Western Governors believe that any definition of surplus waters must plainly exclude natural historic flows from any qualification of water subject to the proposed rule.

Western Governors' concerns also extend to the process by which the rule was developed. States should be afforded the opportunity for early, meaningful, substantive, and ongoing consultation with Federal agencies as part of the development of any Federal rule, policy, or decision which may have impacts on State authority. Nowhere is State consultation more important than in the context of western water resource management.

Consistent with this policy, Executive Order 13132 requires Federal agencies to have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.

In its notice, the Corps declares that it does not believe that the proposed rule has federalism implications. WGA disagrees with this assertion. The proposed rule clearly qualifies for further review under Executive Order 13132, as its provisions would have substantial direct effects on the States and their authority over the management and allocation of their waters, as well as preemptive effects on States' water laws.

Proper State consultation in an agency's decisionmaking process produces more durable, informed, and effective policy, and allows for genuine partnerships to develop between Federal and State officials. Providing States with an opportunity to submit written comments, which is already required under the Administrative Procedures Act, is not the same as consultation.

In conclusion, the Corps' proposed rule has a substantial likelihood of interfering with, impairing, and/or subordinating States' well-established authority to manage and allocate the natural flows of rivers within their boundaries and to implement State water laws.

Any definition of surplus water must account for and exclude natural flows of the river from waters that would be subject to Corps control. The Corps should not deny States access to divert and appropriate such natural flows, nor should the Corps charge storage or access fees where users are making withdrawals of natural flows from Corps reservoirs.

The Corps should consult with States on a government-to-government level to better understand the impacts the proposed rule may have on States' authority over water resources and ways in which

the Corps can partner with States to more effectively manage its projects.

Thank you again for providing this opportunity to testify and for bringing attention to these important issues of States' rights and Federal responsibilities.

[The prepared statement of Mr. Scott follows:]

**Written Testimony of Ward J. Scott, Policy Advisor  
Western Governors' Association**

**Submitted to the United States Senate  
Committee on Environment and Public Works  
Subcommittee on Superfund, Waste Management, and Regulatory Oversight  
June 13, 2018**

**Oversight of the Army Corps' Regulation of Surplus Water and the Role of States' Rights**

Chair Rounds, Ranking Member Booker, and Members of the Subcommittee, I appreciate the opportunity to testify today on behalf of the Western Governors' Association (WGA). My name is Ward Scott and I am a Policy Advisor with the Association, where my work focuses on western water policy and state-federal relations.

WGA represents the Governors of 19 western states and three U.S. territories and is an instrument of the Governors for bipartisan policy development, information-sharing, and collective action on issues of critical importance to the western United States. The elected and appointed officials of the western states have a long history of responsible land and water resource management and of working collaboratively with the administrative agencies of the federal government.

My testimony will focus on the Western Governors' concerns with the U.S. Army Corps of Engineers (Corps) proposed rule, "Use of [Corps] Reservoir Projects for Domestic Municipal & Industrial Water Supply" (Proposed Rule).<sup>1</sup> Western Governors have consistently expressed their opposition to the Proposed Rule and to any agency rule or policy that would – or has the potential to – interfere with, subordinate, or in any way diminish states' well-established legal authority over water resources within their boundaries.

Western Governors' concerns regarding the Proposed Rule focus on three primary elements. First, the Proposed Rule may have preemptive effects on states' sovereign authority over water resources and corresponding state laws. Second, the Corps' overly-broad proposed definition of the term "surplus waters" includes natural, historic river flows, which should remain under state jurisdiction. Third, the Corps' has not adequately consulted with potentially-affected states, nor has it properly assessed potential federalism implications as required by Executive Order 13132, in its development of the Proposed Rule.<sup>2</sup>

Water is precious everywhere but especially in the West, where consistently arid conditions, diverse landscapes and ecosystems, and growing populations present unique challenges in the allocation and management of scarce water resources. State water laws have developed over the course of decades, and vary greatly to account for local hydrology, the interplay between Tribal, state, and federal legal rights, and complicated systems of water allocation. In the West, water must generally be appropriated under state-granted water rights and is often transferred long distances from its point of diversion to its point of use. Additionally, western water users often possess vested private property rights in water, which are granted and administered by the states. Western

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<sup>1</sup> 81 Fed. Reg. 91556 (Dec. 16, 2016).

<sup>2</sup> WGA Comments, Feb. 27, 2017. Available at:

[http://westgov.org/images/editor/USACE\\_Surplus\\_Waters\\_Rule\\_-\\_final.pdf](http://westgov.org/images/editor/USACE_Surplus_Waters_Rule_-_final.pdf).

state water laws – and the regulatory frameworks within which they operate – are complex and diverse and must be accounted for in the development of any Corps rule or policy.

#### State Authority over Water Resource Management and Allocation

Western Governors have adopted policy (WGA Policy Resolution 2015-08, Water Resource Management in the West) that articulates a fundamental principle recognized by both Congress and the United States Supreme Court:

States are the primary authority for allocating, administering, protecting, and developing water resources, and they are primarily responsible for water supply planning within their boundaries. States have the ultimate say in the management of their water resources and are best suited to speak to the unique nature of western water law and hydrology.<sup>3</sup>

This well-established state authority is rooted in the U.S. Constitution's Tenth Amendment, which guarantees that, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."<sup>4</sup> States, upon their admission to the Union, established their sovereign authority over water resources under the Equal Footing Doctrine<sup>5</sup> and continue to maintain this broad authority, unless preempted by federal law.<sup>6</sup> Federal statutes addressing western water management have consistently expressed that states possess primary authority over their water resources and that it is the intent of Congress to preserve and respect such authority and corresponding state laws.<sup>7</sup>

No federal laws cited by the Corps that may be applicable to Proposed Rule expressly or impliedly preempt state's authority to manage and allocate water resources. Rather, the two federal statutes relied upon by the Corps in its Notice of Proposed Rulemaking (NPRM)<sup>8</sup> – the Flood Control Act of 1944 and the Water Supply Act of 1958 – clearly recognize and defer to state law.

Section 1 of the Flood Control Act of 1944 begins with the following: "[I]t 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..."<sup>9</sup> Similarly, in the Water Supply Act of 1958, Congress declared its intent "to recognize the primary responsibilities of the States and local interests in developing water supplies for domestic, municipal, industrial, and other purposes and that the Federal Government should participate and cooperate with States and local interests in developing such water supplies

<sup>3</sup> WGA Policy Resolution 2015-08, Water Resource Management in the West. Available at: [http://westgov.org/images/editor/RESO\\_Water\\_Resources\\_Final\\_Version\\_08.pdf](http://westgov.org/images/editor/RESO_Water_Resources_Final_Version_08.pdf)

<sup>4</sup> U.S. Const. amend. X.

<sup>5</sup> *Pollard v. Hagan*, 44 U.S. 212 (1845).

<sup>6</sup> *Martin v. Lessee of Waddell*, 41 U.S. 367, at 410 (1842) ("[T]he people of each state became themselves sovereign; and in that character hold the absolute right to all of their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government."); see also, *Kansas v. Colorado*, 206 U.S. 46 (1907); *California Oregon Power v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935); *PPL Montana v. Montana*, 565 U.S. 576 (2012).

<sup>7</sup> See, e.g., the 1866 Mining Act (43 U.S.C. § 661); the 1877 Desert Land Act (43 U.S.C. §321); the 1920 Federal Power Act (16 U.S.C. §§ 802, 821); the Clean Water Act (33 U.S.C. § 1251(b) and (g)); the 1902 Reclamation Act (43 U.S.C. § 383); *Pollard v. Hagan*, 44 U.S. 212 (1845); *California v. United States*, 438 U.S. 645 (1978).

<sup>8</sup> 81 Fed. Reg. 91556 (Dec. 16, 2016).

<sup>9</sup> 43 U.S.C. § 701-1.

in connection with the construction, maintenance, and operations of Federal navigation, flood control, irrigation, or municipal purpose projects.”<sup>10</sup> Although the Corps cites various statements of Congressional intent to justify certain provisions of the Proposed Rule in its NPRM, no intent of Congress is more repeatedly and clearly expressed throughout the controlling statutes than the preservation of, and respect for, states’ authority over their water resources.

#### **The Corps’ Proposed Rule**

Through its Proposed Rule, the Corps seeks to establish policies governing the use of its reservoir projects within the Upper Missouri River Basin and the treatment of “surplus water” within that system.<sup>11</sup> Although the Proposed Rule attempts to address “specific issues that have arisen most notably in the Corps’ Northwestern and South Atlantic Divisions,” the Corps has stated that it “is also intended to provide greater clarity, consistency, and efficiency in implementing [the Flood Control Act of 1944 and the Water Supply Act of 1958] nationwide.”<sup>12</sup>

Western Governors have expressed their concerns regarding both the substance of the Proposed Rule and the process by which it was developed, both through WGA and individually<sup>13</sup> and remain concerned that the procedural, legal, and technical issues cited in comments and letters, as well as the views and concerns expressed by individual states, have still not been addressed by the Corps or incorporated into its decisionmaking processes. These concerns were heightened by the Corps’ listing of the Proposed Rule in the Spring 2018 Unified Agenda of Regulatory and Deregulatory Actions’ as currently in its “Final Rule Stage” with a “Final Action” date estimated as January 2019.

#### **Definition and Treatment of “Surplus Waters”**

Through the Proposed Rule, the Corps seeks to address the use of its reservoir projects for domestic, municipal, and industrial water supply, and clarify its use of water supply contracts to authorize the withdrawal of “surplus waters” from Corps reservoirs. The Corps’ administration of water supply contracts at its reservoirs should not have any negative effect on states’ primary authority over the management and allocation of their water resources or state laws enacted for such purposes. The Proposed Rule, however, fails to distinguish between “surplus water,” which is defined in relation to storage and authorized purposes, and “natural flows,” which is defined as waters that would have been available for use in the absence of federal dams and reservoirs.

Section 6 of the Flood Control Act of 1944 authorizes the Corps to enter into agreements “for domestic and industrial uses of surplus water that may be available at any [Corps] reservoir,” provided such uses do not “adversely affect then-existing lawful uses of such water.” The statute does not provide a definition for “surplus waters.” Under the Proposed Rule, the Corps would define “surplus water” to mean any water available at a Corps reservoir that is not required during a specified time period to accomplish an authorized purpose or purposes of that reservoir.

<sup>10</sup> 43 U.S.C. § 390b.

<sup>11</sup> 81 Fed. Reg. 91556 (Dec. 16, 2016).

<sup>12</sup> 81 Fed. Reg. 91558-59.

<sup>13</sup> Western states submitting individual comments to the Corps include: [The State of Idaho](#); [the State of Nebraska](#); [the State of North Dakota](#); [the State of Oklahoma](#); and [the State of South Dakota](#). Comments were also submitted by the [Western States Water Council](#); [North Dakota Water Commission](#); [North Dakota Water Users Association](#); [Association of California Water Agencies](#); and the [Texas Commission on Environmental Quality](#).

The Corps does not claim that federal law preempts state authority over natural flows through the Flood Control Act of 1944, the Water Supply Act of 1958, or any other relevant statute. Nor have states transferred or ceded any rights to, or authority over, the allocation and management of natural flows to the Corps. In its NPRM, the Corps acknowledges that some portion of waters to be defined as “surplus” would exist without Corps’ water storage: “The Corps also recognizes that some withdrawals that it may authorize from a Corps reservoir pursuant to Section 6 could have been made from the river in the absence of the Corps reservoir project, and in that sense may not be dependent on reservoir storage.”<sup>14</sup>

The proposed definition of “surplus waters” is beyond the scope of the Corps’ statutory authority and would usurp states’ well-established sovereign authority over the natural flows of water through Corps reservoirs. As a result, the Proposed Rule would conflict with Congress’s clear intent to preserve state water law. Western Governors believe that any definition of “surplus waters” must plainly exclude natural historic flows from any quantification of waters subject to the Proposed Rule. Additionally, natural flows should be exempt from any monetary charges imposed by the Corps for water storage, as such waters would exist within the streambed in the absence of Corps reservoirs and would not be subject to federal management or the imposition of federal fees.

#### **Rulemaking Process**

In addition to the substance of the Proposed Rule, Western Governors are concerned about the process by which it was developed. States should be afforded the opportunity to consult with federal agencies as part of the development of any federal rule, policy or decision which may have significant impacts on states’ authority – both inherent and delegated. Nowhere is state consultation more important than in the context of water resource management.

Western Governors emphasize in WGA Policy Resolution 2017-01, Building a Stronger State-Federal Relationship, that federal agencies should, “have a clear and accountable process to provide each state – through its Governor as the top elected official of the state and other representatives of state and local governments as he or she may designate – with early, meaningful, and substantive input in the development of regulatory policies that have federalism implications.”<sup>15</sup> State consultation should be an ongoing process and should continue from the development stage of any proposed rule throughout its promulgation. As the agencies receive additional information, Governors and the state officials they designate should have the opportunity for ongoing engagement with the agencies to develop refinements to any rule.

Consistent with this policy, Executive Order 13132, Federalism, requires federal agencies to “have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have Federalism implications.”<sup>16</sup> These policies include “regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.”<sup>17</sup> In its NPRM, the Corps declares that it “do[es] not believe that the

<sup>14</sup> 81 Fed. Reg. 91556 (Dec. 16, 2016).

<sup>15</sup> WGA Policy Resolution 2017-01, Building a Stronger State-Federal Relationship. Available at: [http://westgov.org/images/editor/PR\\_2017-01\\_State\\_Federal\\_Relationship.pdf](http://westgov.org/images/editor/PR_2017-01_State_Federal_Relationship.pdf).

<sup>16</sup> 64 Fed. Reg. 43255 (Aug. 10, 1999).

<sup>17</sup> *Id.*

proposed rule has Federalism implications.”<sup>18</sup> WGA disagrees with this assertion. The Proposed Rule clearly qualifies for further review under Executive Order 13132, as its provisions would have substantial direct effects on the states and their authority over the management and allocation of their waters. The Proposed Rule would also have a preemptive effect on state water laws (*i.e.*, a substantial effect “on the distribution of power and responsibilities among the various levels of government.”).

Proper state consultation in an agency’s decisionmaking process produces more durable, informed, and effective policy and allows for genuine partnerships to develop between federal and state officials. Providing states with an opportunity to submit written comments – which is already required under the Administrative Procedures Act – is not the same process as “consultation.”<sup>19</sup> Federal courts have relied on an ordinary definition of “consultation” and have concluded that state consultation requires a meaningful opportunity for dialogue between state and federal officials, where federal decisionmakers “seek information or advice from” states or “have discussions or confer with [states], typically *before* undertaking a course of action.”<sup>20</sup>

While WGA has submitted written comments under the normal procedures for public input, Western Governors have asserted that states should have been consulted throughout this rulemaking process. In addition to written comments submitted in response to the Corps’ Notice of the Proposed Rule, WGA issued letters in August 2013 and again in October 2017 regarding the Corps’ failure to adequately engage with states in the development of the Proposed Rule. It is our understanding that Corps officials have conducted little to no outreach to Governors’ offices in response to their expressed concerns regarding the Proposed Rule. This failure to consult with states has resulted in a rule that largely ignores state concerns that have been consistently communicated to the Corps.

The Corps should develop rules and policies establishing comprehensive procedures for state consultation, requiring its officials to conduct pre-decisional – as well as ongoing – government-to-government engagement with states through their Governors’ offices. Such measures should be implemented prior to any decision in which the Corps asserts jurisdiction over matters traditionally under state authority.

### **Conclusion**

Western Governors have a history of responsible and comprehensive water management within their states and of working with federal agencies on water-related matters. The Proposed Rule has a substantial likelihood of interfering with, impairing, and/or subordinating states’ well-established authority to manage and allocate the natural flows of rivers within their boundaries and to implement state water laws.

Any definition of “surplus water” must account for, and exclude, natural flows of the river from waters that would be subject to Corps control. The Corps should not deny access to divert and appropriate such natural flows, nor should the Corps charge storage or access fees where users are making withdrawals of natural flows from Corps reservoirs. No federal statute purports to assert federal jurisdiction over these waters or to preempt state law.

<sup>18</sup> 81 Fed. Reg. 91556 (Dec. 16, 2016).

<sup>19</sup> *California Wilderness Coalition v. U.S. Dept. of Energy*, 631 F.3d 1072, 1087 (9th Cir. 2011).

<sup>20</sup> *The New Oxford Dictionary* 369 (2001).

The Corps should consult with states, on a government-to-government level, to better understand the impacts the Proposed Rule may have on states' authority over water resources and ways in which the Corps can partner with states to effectively manage its projects and resources.

This concludes my testimony. Thank you again for providing the opportunity to testify and for bringing attention to these important issues of states' rights and federal responsibilities. I will be happy to answer any questions you have.

Senator ROUNDS. Thank you for your testimony, Mr. Scott. We will now turn to our third witness, Stephen Mulligan. Mr. Mulligan, you may begin.

**STATEMENT OF STEPHEN MULLIGAN, J.D., LEGISLATIVE ATTORNEY, CONGRESSIONAL RESEARCH SERVICE**

Mr. MULLIGAN. Thank you, Mr. Chairman. Chairman Rounds, Ranking Member Booker, my name is Stephen Mulligan. I am a legislative attorney in the American Law Division of the congressional Research Service. Thank you for inviting me to testify today on behalf of CRS. I will be addressing legal authorities related to the Army Corps of Engineers' regulation of surplus water and the role of States' rights.

While there may be a number of policy-related questions that arise this afternoon, my testimony focuses on the Corps' legal authorities. Separate from this testimony, CRS has provided a memorandum to the Subcommittee written by my colleague, Nicole Carter, that addresses many of the policy and process-related issues.

The Supreme Court historically has held that the Corps' authority for projects in navigable waters derives from the Commerce Clause and the Federal Government's interest in promoting navigation throughout the Nation's waterways.

In 1899, the Court explained that the States' control of the appropriation of their waters is subject to the superior power of the general government to secure the uninterrupted navigability of all the navigable streams within the limits of the United States.

In the 1940 decision, the Court held that a State could not enjoin the Corps from constructing a dam or reservoir, even if the water impounded within the reservoir was controlled by the State because, in that case, the State's program for water development and conservation must bow before the superior power of Congress.

But the Supreme Court also has a long history of cases recognizing that a State owns the navigable waters within its borders. When the United States was formed, the Supreme Court explained the people of each State became themselves sovereign, and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government. Under the constitutional equal footing doctrine, States that later joined the Union acquired the same rights granted to the original States and, therefore, also acquired ownership of their States' navigable waters upon achieving statehood.

When these two lines of cases are viewed together, there is a tension between the rights of States to use and regulate navigable waters within their borders and the right of the Federal Government to exercise the authority under the Commerce Clause. And this tension is not limited to high level constitutional principles; it also exists within the texts of the relevant authorizing statutes for the Army Corps of Engineers. The Flood Control Act of 1944 authorizes various Army Corps projects in navigable waters. It also authorizes the Corps to contract for surplus water that may be available at Federal reservoirs under the control of the Department of the Army.

Even though the statutes grants authority to the Secretary of the Army as an exercise of Federal power, it also provides that it is 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.

Similarly, the Water Supply Act of 1958 is an exercise of Federal power that authorizes certain Corps action with regard to Federal reservoirs, but it provides that Congress recognizes that the primary responsibilities of the States and local interests in developing water supplies for domestic, municipal, industrial, and other purposes.

This tension created by the interplay between Federal power derived from the Commerce Clause and States' sovereign right to navigable waters has manifested itself in discussion over the Corps' 2016 Notice of Proposed Rulemaking on the use of U.S. Army Corps of Engineers reservoir projects for domestic, municipal, and industrial water supply.

Some have called into question whether the proposed rule is a valid exercise of Federal constitutional and statutory authority. While some aspects of the Corps authority on which the proposed rule is based have been the subject of litigation, such as the division of authority between the Corps and the Department of the Interior under the 1944 Flood Control Act, it does not appear that the provision in question has been litigated with respect to potential interference with State ownership of water.

To date, the Supreme Court has not clearly defined the Corps' obligation with respect to States' rights over surplus water that is held in or passes through the Corps' reservoirs.

Thank you, and I will be happy to answer questions at the appropriate time.

[The prepared statement of Mr. Mulligan follows:]



Statement of

**Stephen P. Mulligan**  
Legislative Attorney

Before

Committee on Environment and Public Works  
Subcommittee on Superfund, Waste Management, and Regulatory  
Oversight  
U.S. Senate

Hearing on

**“Oversight of the Army Corps’ Regulation of  
Surplus Water and the Role of States’ Rights”**

June 13, 2018

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Chairman Rounds, Ranking Member Booker, and Members of the Subcommittee, my name is Stephen Mulligan. I am a legislative attorney in the American Law Division of the Congressional Research Service (CRS). Thank you for inviting me to testify on behalf of CRS regarding the U.S. Army Corps of Engineers (Corps) regulation of surplus water and the role of states' rights.

The Corps operates federal water projects for a variety of purposes, which Congress identifies when it authorizes a project.<sup>1</sup> Various water supply shortages and greater demand for water supply related to municipal and industrial uses (M&I) have brought increased attention to disputes over the control of water resources across the country. For example, new applications of energy extraction technologies have increased oil and gas production from shale formations in various regions of the United States.<sup>2</sup> And expanding populations in the United States have created greater need for domestic access to water sources.<sup>3</sup>

Although the federal government has authority related to water resources management, water allocation has traditionally been a matter left to the states, which administer their own water rights systems, and which possess certain rights to regulate the water use within their boundaries as an attribute of state sovereignty.<sup>4</sup> At the same time, the Supreme Court has long recognized that federal constitutional powers—primarily the Commerce Clause—may limit states' rights to control their waters.<sup>5</sup> This dual exercise of authority over water resources has led to questions regarding a recent Corps' rule entitled "Use of U.S. Army Corps of Engineers Reservoir Projects for Domestic, Municipal & Industrial Water Supply" (Proposed Rule), discussed in more detail below.<sup>6</sup>

## Constitutional Authority for Water Storage at Federal Water Projects

The Corps has broad constitutional authority for its water projects. The Supreme Court historically has held that the Corps' authority derives from the Commerce Clause and the importance of promoting navigation throughout the nation's waterways.<sup>7</sup> The breadth of this authority regarding various purposes of the Corps' operations has been recognized by the Supreme Court in multiple cases.

In 1899, the Court explained that the states' control of the appropriation of their waters was subject to "the superior power of the General Government to secure the uninterrupted navigability of the all

<sup>1</sup> For additional background on authorized purposes for Corps' projects, see CRS Report R42805, *Reallocation of Water Storage at Federal Water Projects for Municipal and Industrial Water Supply*, by Cynthia Brown and Nicole T. Carter. For analysis of certain policy-related issues to the Corps' reservoirs, see the congressional distribution memorandum submitted with this testimony titled *Army Corps of Engineers Reservoirs: Municipal and Industrial Water Supply Activities* by Nicole Carter, Specialist in Natural Resources Policy, dated June 12, 2018 [Carter Memorandum].

<sup>2</sup> See CRS Report R42333, *Marcellus Shale Gas: Development Potential and Water Management Issues and Laws*.

<sup>3</sup> E.g. In re MDL-1824 Tri-State Water Rights Litig., 644 F.3d 1160, 1171 (11th Cir. 2011) (discussing the growing water needs in Atlanta).

<sup>4</sup> See *infra* § State Ownership of Water Within Its Boundaries.

<sup>5</sup> See U.S. CONST., art. I, §8, cl. 3 ("The Congress shall have power to . . . regulate commerce with foreign nations, and among the several states, and with the Indian tribes . . ."). See also *infra* § Constitutional Authority for Water Storage at Federal Water Projects.

<sup>6</sup> Use of U.S. Army Corps of Engineers Reservoir Projects for Domestic, Municipal & Industrial Water Supply, 81 Fed. Reg. 91556 (Dec. 16, 2016) [Proposed Rule].

<sup>7</sup> See *Gibbons v. Ogden*, 22 U.S. 1 (1824).

navigable streams within the limits of the United States.”<sup>8</sup> Citing this principle, the Court later held that a state could not enjoin the Corps from constructing a dam and reservoir, even if the water impounded within the reservoir was controlled by the state.<sup>9</sup> The Court rejected the state’s argument that the project would interfere “with the state’s own program for water development and conservation ... [which] must bow before the ‘superior power’ of Congress.”<sup>10</sup>

The Court has indicated that Congress’s constitutional “authority is as broad as the needs of commerce.”<sup>11</sup> It has explained that maintaining the navigability of waterways is only one of the various purposes for which the federal government may exercise authority over water.<sup>12</sup> The Court has stated that if a particular project serves a purpose of navigation, “it is constitutionally irrelevant that other purposes may also be advanced.”<sup>13</sup> It has cited other valid purposes such as flood control, watershed development, and “recovery of the cost of improvements through utilization of power” as examples of the breadth of federal authority over waters.<sup>14</sup>

Thus, a state’s authority over its waters is “subject to the power of Congress to control the waters for the purpose of commerce.”<sup>15</sup> Accordingly, if Congress authorizes the Corps to impound water at one of its projects for purposes related to commerce, the federal authority over the water likely supersedes the state’s authority for those purposes. Notwithstanding this broad authority, Congress historically has deferred to states’ authority regarding water allocation, as discussed below.

## Statutory Authority Related to Water Storage at Corps’ Projects

Under the Flood Control Act of 1944 (1944 FCA),<sup>16</sup> the Corps may enter contracts with other government or private parties for the temporary use of surplus water from its projects.<sup>17</sup> Under the Water Supply Act of 1958 (WSA),<sup>18</sup> the Corps may enter storage agreements providing permanent storage space at a reservoir, even if Congress did not originally authorize such a purpose for the project.<sup>19</sup> The Corps’ guidance states that surplus water contracts generally should have terms of five years.<sup>20</sup>

<sup>8</sup> *United States v. Rio Grande Dam and Irrigation Co.*, 174 U.S. 690, 703 (1899).

<sup>9</sup> *Oklahoma v. Atkinson*, 313 U.S. 508 (1941) (“Since the construction of this dam and reservoir is a valid exercise by Congress of its commerce power, there is no interference with the sovereignty of the state.”).

<sup>10</sup> *Id.* at 534-35.

<sup>11</sup> *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 426 (1940).

<sup>12</sup> *Id.*

<sup>13</sup> *United States v. Twin City Power Co.*, 350 U.S. 222, 224 (1955).

<sup>14</sup> *United States v. Appalachian Electric Power Co.*, 311 U.S. at 426.

<sup>15</sup> *Id.* at 423.

<sup>16</sup> Act of December 22, 1944, 58 Stat. 887.

<sup>17</sup> 33 U.S.C. §708.

<sup>18</sup> 43 U.S.C. §390b.

<sup>19</sup> 43 U.S.C. §390b.

<sup>20</sup> See U.S. ARMY CORPS OF ENG’RS, PLANNING GUIDANCE NOTEBOOK, ER 1105-2-100, at app. E (2000) [ER 1105-2-100].

### Section 6 of the Flood Control Act of 1944

Section 6 of the 1944 FCA specifically authorizes the Corps to enter contracts for surplus water. The Corps “is authorized to make contracts with States, municipalities, private concerns, or individuals, at such prices and on such terms as [it] may deem reasonable, for domestic and industrial uses for surplus water that may be available at any reservoir under the control of the [Corps].”<sup>21</sup> The contracts entered under Section 6 must not “adversely affect then existing lawful uses of such water.”<sup>22</sup> Section 1 of the 1944 FCA states that “it is 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 . . . .”<sup>23</sup> While some aspects of the Corps’ authority under the 1944 FCA have been the subject of litigation—such as the division of authority between the Corps and the Department of the Interior<sup>24</sup>—it does not appear that Section 6 has been litigated with respect to potential interference with state ownership of water.

### The Water Supply Act of 1958

In 1958, Congress recognized state primacy in developing M&I supplies, stating,

It is hereby declared to be the policy of the Congress to recognize the primary responsibilities of the States and local interests in developing water supplies for domestic, municipal, industrial, and other purposes and that the Federal Government should participate and cooperate with States and local interests in developing such water supplies in connection with the construction, maintenance, and operation of Federal navigation, flood control, irrigation, or multiple purpose projects.<sup>25</sup>

To promote this policy, the WSA authorizes the Corps to include water storage for M&I use as a project purpose for new and existing projects: “[S]torage may be included in any reservoir project surveyed, planned, constructed or to be planned, surveyed and/or constructed by the Corps of Engineers . . . to impound water for present or anticipated future demand or need for municipal or industrial water. . . .”<sup>26</sup>

The WSA includes some limits on how the Corps may add M&I storage as a purpose for its projects.<sup>27</sup> Congress indicated that construction and modification costs would be shared by state and local interests and that such costs would be “determined on the basis that all authorized purposes served by the project shall share equitably in the benefits of multiple purpose construction.”<sup>28</sup> The WSA states that it does not modify Section 1 of the 1944 FCA.<sup>29</sup>

### Additional Statutory Authorities and Restrictions

In addition to the WSA and 1944 FCA, other federal laws may impact the Corps’ ability to enter water supply agreements or assess charges for such agreements on a project-specific or location-specific basis.

<sup>21</sup> 33 U.S.C. §708.

<sup>22</sup> *Id.*

<sup>23</sup> 33 U.S.C. §701-1.

<sup>24</sup> *E.g.*, *ETSI Pipeline v. Missouri*, 484 U.S. 495, 509 (1988) (concluding that the 1944 FCA gave the Corps, and not the Department of the Interior, and authority to contract to provide “surplus water” from Lake Oahe).

<sup>25</sup> 43 U.S.C. §390b(a).

<sup>26</sup> 43 U.S.C. §390b(b).

<sup>27</sup> Modifications authorized by the WSA that “seriously affect” original purposes or “involve major structural or operational changes” must be approved by Congress. 43 U.S.C. §390b(e).

<sup>28</sup> 43 U.S.C. §390b(b).

<sup>29</sup> 43 U.S.C. §390b(d).

For example, under the Water Resources Reform and Development Act of 2014 (WRRDA 2014), no charges may be assessed on surplus water contracts on the Missouri River mainstem reservoirs until June 2024.<sup>30</sup> Other federal laws have mandated that the Corps enter into agreements authorizing usage of specific federal facilities during droughts or emergencies and have specified the cost that may be allowed for water supply.<sup>31</sup>

## State Ownership of Water Within Its Boundaries

The U.S. Supreme Court has long held that a state owns the navigable waters within its borders.<sup>32</sup> In 1842, the Court explained that when the United States was formed, “the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government.”<sup>33</sup>

Under the constitutional equal footing doctrine, states that later joined the union acquired the same rights granted to the original states, and therefore also acquired ownership of their state’s navigable waters upon achieving statehood.<sup>34</sup> Thus, states that were admitted to the union and were not part of the original 13 colonies still may claim certain rights to waters within their state boundaries.

Although the Supreme Court recognized state ownership of water within state boundaries, it also has indicated that the state’s interest in its waters could be limited by superseding rights assigned under the Constitution to the federal government.<sup>35</sup> In other words, a state may not claim absolute ownership to navigable waters if the federal government has constitutional authority to act with respect to those waters.

## Congressional Treatment of States’ Water Rights at Federal Water Projects

Although the federal government has authority to regulate water, Congress historically has deferred to the states’ authority regarding allocation of water resources within each state. In some cases, Congress explicitly has recognized the states’ power to assign water rights, though it has done so on a limited basis. At other times, it has noted the competing roles of federal and state governments with respect to water resources management and included general statements recognizing the interests of a state related to specific legislation.

In some instances, Congress has recognized the authority of states to allocate water and consequently required federal compliance with state water rights schemes. For example, Section 8 of the Reclamation Act of 1902 (Reclamation Act) requires the Bureau of Reclamation (Reclamation) to conform with state

<sup>30</sup> Water Resources Reform and Development Act of 2014, Pub. L. No. 113-121, § 1046(c).

<sup>31</sup> *E.g.*, Water Resources Development Act of 2007, Pub. L. No. 110-114, § 5019(c)(1) (“The Secretary shall enter into an agreement with the Delaware River Basin Commission to provide temporary water supply and conservation storage at the Francis E. Walter Dam, Pennsylvania, for any period during which the Commission has determined that a drought warning or drought emergency exists.”); *id.* § 5019(c)(2) (“The agreement shall provide that the cost for water supply and conservation storage under paragraph (1) shall not exceed the incremental operating costs associated with providing the storage.”).

<sup>32</sup> *E.g.*, *Tarrant Reg’l Water Dist. v. Hermann*, 133 S. Ct. 2120, 2132 (2013) (“States possess an ‘absolute right to all their navigable waters and the soils under them for their own common use.’”) (quoting *Martin v. Waddell’s Lessee*, 41 U.S. 367, 410 (1842)).

<sup>33</sup> *Martin*, 41 U.S. at 410.

<sup>34</sup> *Pollard*, 44 U.S. at 228-29. *See also* U.S. CONST. art. IV, §3, cl. 1.

<sup>35</sup> *E.g.*, *Martin*, 41 U.S. at 410.

water laws “relating to the control, appropriation, use, or distribution of water . . . .”<sup>36</sup> The Supreme Court has explained that Section 8 “requires the Secretary to *comply* with state law in the ‘control, appropriation, use or distribution of water’” by a federal project, confirming that Reclamation must acquire water rights for water it impounds at its water projects in various states (as had been the agency’s practice).<sup>37</sup> Reclamation then contracts with water users to provide water. Reclamation generally holds the water right, which is allocated by the state’s water authority, and the water users hold a contract right to the water provided under their agreement with Reclamation.<sup>38</sup>

The 1944 FCA and WSA do not include an identical requirement that the Corps must “comply” with state law in its water use. While there are textual differences between the Reclamation Act and the Corps’ statutory authorities, Congress has not ignored the relationship between federal legislation authorizing the Corps’ projects and state water rights. The 1944 FCA and WSA arguably may indicate that Congress intended to protect the states’ ability to administer water rights under state law to some degree despite the Corps’ use of the water.

In Section 1 of the 1944 FCA, Congress stated “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 . . . .”<sup>39</sup> Congress included specific protection for waters in states “lying wholly or partly west of the ninety-eighth meridian”—the drier, western states.<sup>40</sup> Section 1(b) states that the use of waters in those states is authorized for navigation only if it “does not conflict with any beneficial consumptive use, present or future, in [such states], of such waters for domestic, municipal, stock water, irrigation, mining, or industrial purposes.”<sup>41</sup> In other words, the Corps is not authorized to use water for navigation in the western states if the Corps’ use of the water would interfere with other beneficial uses.

The WSA states that it does not modify Section 1 of the 1944 FCA, potentially signaling that Congress was not authorizing interference with certain other uses of water at federal projects. During hearings related to the passage of the WSA, a Senate subcommittee debated that provision and the effect the legislation would have on state water rights.<sup>42</sup> One Senator, advocating for recognition of states’ authority to administer water rights, explained that federal law requires that any water used in Reclamation projects be acquired through water rights assigned by the state in which the project is located, and argued that the Corps likewise should be required to comply with state water laws.<sup>43</sup> Although the final legislation did not include an express statement requiring the Corps to obtain state water rights for its projects, Congress amended the original language to remove a provision that was thought to imply that only certain water

<sup>36</sup> See 43 U.S.C. §383. Section 8 states the following:

[n]othing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof.

*Id.*

<sup>37</sup> See *California v. United States*, 438 U.S. 645, 674-75 (1978) (emphasis added).

<sup>38</sup> In some cases, water users may have perfected a water right prior to a project’s construction and may receive water from a Reclamation project under a separate delivery contract.

<sup>39</sup> 33 U.S.C. §701-1.

<sup>40</sup> 33 U.S.C. §701-1(b).

<sup>41</sup> *Id.*

<sup>42</sup> U.S. Congress, Senate Committee on the Public Works, Subcommittee on Flood Control—Rivers and Harbors, *Rivers and Harbors—Flood Control Act of 1958, Hearing on S. 3910*, 85th Cong. 126-35 (1958).

<sup>43</sup> *Id.* at 131.

rights under state law may be recognized.<sup>44</sup> The final language states that the authority provided under the WSA “shall not be construed to modify” Section 1 of the 1944 FCA or Section 8 of the Reclamation Act.<sup>45</sup>

## The December 16, 2016 Proposed Rule

On December 16, 2016, the Proposed Rule regarding the Corps’ policies and regulations related to the use of reservoir projects for M&I supply was published in the Federal Register.<sup>46</sup> Although subject to change, the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget currently states that a final action on the Proposed Rule is expected to take place in January 2019.<sup>47</sup>

The Proposed Rule provides that it is intended to set forth the Corps’ interpretations of its authority under Section 6 of the FCA 1944 and the WSA.<sup>48</sup> The Corps’ states that the “overall intent” of the Proposed Rule is to “enhance the Corps’ ability to cooperate with State and local interests by facilitating water supply uses of Corps reservoirs in a manner that is consistent with the authorized purposes of those reservoirs, and does not interfere with lawful uses of water under State law or other Federal Law.”<sup>49</sup> The Proposed Rule would apply only to Corps reservoir projects and not to projects operated by other federal or non-federal entities.<sup>50</sup>

The Proposed Rule states that it has multiple objectives:

1. Defining certain statutory terms and explaining differences among statutory authorities;
2. Addressing certain policy questions, including pricing of surplus water agreements under Section 6 of the FCA 1944; reallocation of storage under the WSA; and accounting of storage usage and return flows under WSA agreements; and
3. Clarifying and simplifying processes for approving and entering into water supply agreements at Corps reservoirs.<sup>51</sup>

The following discussion addresses those provisions that are most relevant to surplus water.<sup>52</sup>

## Definitions of Statutory Terms

Among other things, the Proposed Rule would provide a common definition for the terms “reservoirs,” “projects” and “reservoir projects” as those terms are used in the WSA and Section 6 of the 1944 FCA.<sup>53</sup>

<sup>44</sup> See *id.* at 134-35. The following language was from the WSA: “nor shall any storage provided under the provisions of this section to be operated in such manner as to adversely affect the lawful uses of the water.” *Id.*

<sup>45</sup> 43 U.S.C. §390b(d). The WSA authorizes not only the Corps, but also Reclamation, to include storage for M&I supplies as a project purpose.

<sup>46</sup> Proposed Rule, 81 Fed. Reg. at 91,556. The following section contains a summary of portions of the Proposed Rule, but does not address each provision.

<sup>47</sup> Office of Information and Regulatory Affairs, Office of Management and Budget, *View Rule: RIN: 0710-AA72*, REGINFO.GOV (last visited June 11, 2018), <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201804&RIN=0710-AA72>.

<sup>48</sup> Proposed Rule, 81 Fed. Reg. at 91,556.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> Consistent with the title of the hearing, this testimony focus on issues related to “surplus” water in the 1944 FCA rather than the Proposed Rule’s relationship with the WSA.

<sup>53</sup> *Id.* at 91,560.

The Corps would define the terms “expansively” to include any Corps facility that impounds water and is capable of being operated for multiples purposes and objectives.<sup>54</sup> The Proposed Rule would also include parallel definitions of the terms “domestic and industrial uses” under Section 6 of the 1944 FCA and “municipal and industrial water supply” under the WSA.<sup>55</sup> According to the Corps, these terms would be defined to encompass all water-uses under an applicable water rights allocation system other than irrigation under 33 U.S.C. § 390.<sup>56</sup>

With regard to Section 6 of the 1944 FCA, the Proposed Rule would define “surplus water” as water available at any reservoir that the Assistant Secretary of the Army (Civil Works) determines is not required during a specified time period to accomplish authorized federal purposes for any of the following reasons: (i) the authorized purpose for which such water was originally intended has not fully developed; or (ii) the need for water to accomplish the authorized purpose has lessened; or (iii) the amount of water to be withdrawn, in combination with any other such withdrawals during the specified time period, would have virtually no effect on operations for authorized purposes.<sup>57</sup>

The Proposed Rule would also define the phrase “then existing lawful use” in Section 6 of the 1944 FCA to mean “uses authorized under a State water rights allocation system, or Tribal or other uses pursuant to federal law, that are occurring at the time of the surplus water determination, or that are reasonably expected to occur during the period for which surplus water has been determined to be available.”<sup>58</sup>

### Determining “Reasonable” Prices for Surplus Contracts

The Proposed Rule would modify the methodology by which the Corps determines a “reasonable” price for surplus water contracts under Section 6 of the 1944 FCA.<sup>59</sup> Currently, the Corps uses the same methodology to determine “reasonable” price for temporary surplus contracts under the 1944 FCA and permanent water storage under the WSA, except that the price is calculated on an annualized basis for temporary surplus contracts.<sup>60</sup> The WSA provides that “the cost of any construction or modification . . . section shall be determined on the basis that all authorized purposes served by the project shall share equitably in the benefits of multiple purpose construction . . .”<sup>61</sup>

Under the approach in the Proposed Rule, the Corps would base the price of surplus water contracts on the following:

the actual, full, separable costs, if any, that the Government would incur in making surplus water available during the term of the surplus water agreement, such as by administering and monitoring the contract, or by making temporary changes to reservoir operations to accommodate the surplus

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* See also 43 U.S.C. § 390.

<sup>57</sup> *Id.* at 91,589. Under existing Corps’ guidance, surface water is defined as either:

(1) water stored in a Department of the Army reservoir that is not required because the authorized use for the water never developed or the need was reduced by changes that occurred since authorization or construction; or (2) water that would be more beneficially used as municipal and industrial water than for the authorized purpose and which, when withdrawn, would not significantly affect authorized purposes over some specified time period.

ER 1105-2-100, *supra* note 20, at E-214.

<sup>58</sup> Proposed Rule, 81 Fed. Reg. at 91,589.

<sup>59</sup> *Id.* at 91,560.

<sup>60</sup> ER 1105-2-100, *supra* note 20, at E-115.

<sup>61</sup> 43 U.S.C. § 390b(b). For additional background and analysis of price-related provisions in the Proposed Rule, see Carter Memorandum, *supra* note 1, at 4-9.

water withdrawals. The Corps expects that these costs would be small or nonexistent in most cases, since surplus water by definition is not needed for federal purposes, and typically would not require any operational changes.<sup>62</sup>

Under this change, the price would be based on the cost that can be identified as specifically associated with a surplus contract. For surplus water contracts where federal law provides that no charges may be assessed, such as in the WRRDA 2014,<sup>63</sup> the reasonable fee calculation would not apply.<sup>64</sup>

### Combined Easement and Contract Documents

Under the Proposed Rule, the Corps would require a “combined easement and contract document” for all users of surplus water at a Corps reservoir.<sup>65</sup> The storage agreements authorized under the WSA and surplus contracts authorized under 1944 FCA often have been separate documents from the real estate approvals (e.g., easements) required for construction and operation of the intake facilities.<sup>66</sup> In 2008, the Corps updated its real estate policies to specify that easements supporting water supply agreements should not be issued before a water supply agreement had been executed.<sup>67</sup> But the Corps’ internal audits revealed that withdrawals were still being allowed under approximately 1,600 real estate instruments.<sup>68</sup> Under the Proposed Rule, withdrawals that are occurring pursuant to easements without associated contracts would be reassessed when the easement expires or within five years of the effective date of the final rule.<sup>69</sup> The Corps states that the requirement for a combined document is expected to streamline the process for granting approval to withdraw surplus water and reduce administrative requirements.<sup>70</sup>

### WSA-Related Provisions

In addition to changes to terminology and process for surplus water contracts under the 1944 FCA, the Proposed Rule addresses a number of issues that are entirely or predominately WSA-specific. These include:

- Formalizing and clarifying the Corps’ position regarding when modifications to a reservoir require congressional approval because they would “seriously affect” original purposes or “involve major structural or operational changes . . .”<sup>71</sup>
- Requiring the Corps to consider return flows and other inflows made when determining storage allocations for water supply and the effects of operations for authorized purposes, and on the environment.<sup>72</sup>

<sup>62</sup> Proposed Rule, 81 Fed. Reg. at 91,560.

<sup>63</sup> See *supra* § Additional Statutory Authorities and Restrictions.

<sup>64</sup> Proposed Rule, 81 Fed. Reg. at 91,560-61.

<sup>65</sup> *Id.* at 91,561.

<sup>66</sup> See *id.* at 91,557 (“In many cases . . . the Corps has allowed water to be withdrawn from its reservoirs simply by means of an easement across federal project lands, without formal water supply agreements . . .”). For additional background and analysis of easement-related provisions in the Proposed Rule, see Carter Memorandum, *supra* note 1, at 8-9.

<sup>67</sup> *Id.* at 91,567.

<sup>68</sup> *Id.* at 91,583.

<sup>69</sup> *Id.* at 91,561.

<sup>70</sup> See *id.*

<sup>71</sup> See 43 U.S.C. §390b(d). See CRS Report R42805, *supra* note 1.

<sup>72</sup> Proposed Rule, 81 Fed. Reg. at 91,562.

- Mandating that the Corps incorporate storage accounting in all new WSA storage agreements in a way that makes clear how the Corps measures availability of water for withdrawal, as well as return flows.<sup>73</sup>
- Formalizing what the Corps describes as its prevailing practice of crediting return flows proportionally to all storage accounts rather than to the entity that is responsible for the inflow.<sup>74</sup>

## Conclusion

The Proposed Rule addresses numerous issues that have arisen in the context of regulating water withdrawals from the Corps' reservoirs. While the legal and policy-based comments to the Proposed Rule are too varied to address in this testimony, several commentators have argued that the Proposed Rule infringes on states' rights over navigable waters within their borders.<sup>75</sup> In particular, these commentators argue that the definition of "surplus water" in the Proposed Rule violates a state's right to regulate the use of the "natural flow" of waters that would be available to the state regardless of whether the Corps' infrastructure were in place.<sup>76</sup>

To date, the Supreme Court has not clearly defined the Corps' obligation with respect to states' rights over surplus water that is held in or passes through the Corps' reservoirs. The Corps' constitutional authority to manage its projects for a variety of authorized purposes is broad; Congress has delegated authority to the Corps to store water for M&I purposes and authorized it to charge for surplus water stored at certain projects.<sup>77</sup> But it may also be argued that the Corps' constitutional authority over water stored at its projects extends only to the amount of water necessary to meet the purposes of that project and not to any surplus water.<sup>78</sup> Such an argument, if asserted, may need to be reconciled with Supreme Court precedent recognizing generally broad Commerce Clause authority to regulate navigable waters for purposes of flood control, navigation, and other congressionally approved purposes.<sup>79</sup>

As a matter of statutory interpretation, it may be argued that, although Congress provided statutory authorizations to the Corps related to storage and sale of water stored in a Corps' reservoir, Congress also indicated deference should be made to state uses of the water, and that such deference should inform any interpretation of the Corps' authority under the 1944 FCA and WSA. Such an argument, however, potentially must address the fact that Congress did not include the same express limitations on federal power in the 1944 FCA and WSA that it included in the Reclamation Act, and that the Corps' statutory authority does not expressly include a limitation related to the "natural flow" of state waters.

<sup>73</sup> *Id.*

<sup>74</sup> Proposed Rule, 81 Fed. Reg. at 91,562.

<sup>75</sup> See, e.g., Letter from Phillip C. Ward, Chairman, Western States Water Council to The Honorable Jo-Ellen Darcy, Asst Sec. of the Army (Civil Works) (Aug. 6, 2013); Letter from Earl Lewis, President, Nat'l Water Supply Alliance to U.S. Army Corps of Eng'rs (Nov. 16, 2017).

<sup>76</sup> See, e.g., Letter from Doug Burgum, Governor, State of North Dakota to U.S. Army Corps of Eng'rs (May 11, 2017).

<sup>77</sup> See *supra* § Statutory Authority Related to Water Storage at Corps' Projects.

<sup>78</sup> See *supra* § State Ownership of Water Within Its Boundaries.

<sup>79</sup> See *supra* § Constitutional Authority for Water Storage at Federal Water Projects.

Senator ROUNDS. Mr. Mulligan, thank you very much for being here and thank you for your participation today.

We all each have now 5 minutes in which to work through our questions. There are just a couple of us here. We will take our time, work our way through this. We most certainly appreciate all of your participation.

Let me begin with some of the concerns that we have tried to express here and try to flush them out just a little bit. Let me begin with Secretary Pirner.

As a public service, you have been involved in this process for more than 20 years, I would say. I won't say how much longer than 20 years, but more than 20 years. You probably are uniquely situated to have seen the ongoing processes involved in this discussion throughout several decades.

From a quality of life standpoint, can you speak to the impact this proposed rule could have on not just South Dakota, but all of rural America?

Mr. PIRNER. Yes, sir, Senator Rounds. The Missouri River into South Dakota, as I mentioned during my testimony, is the largest, most reliable surface water supply in South Dakota. South Dakota is a relatively arid State. Our other surface water supplies are seasonal, especially on the eastern side of the State. At times we go to zero flow in the fall. Groundwater is basically our remaining water supply, and there we don't have it everywhere, and where we do have it a lot of times the quality is poor. So, the Missouri River is a high quality, very, very important water supply to the State.

You talked about quality of life. It is not only a recreational use; it is also a major water supply use. By now, we have 126, out of our 464, drinking water systems that are regulated under the Safe Drinking Water Act that get their water from the Missouri River. That is 27 percent of our water systems.

Senator ROUNDS. Let me just stop you right there very quickly. Can you share a little bit about, most recently, the challenges that some of the drinking water systems that even are currently in effect have had accessing to repair or upgrade their systems with even getting access over the Corps' take land, which is the land which surrounds the reservoir system that they have purchased in order for the water to rise and fall? They have a take line, it is basically Federal Government property that they control, but in order to get to the water you cross Corps land in 90 percent of South Dakota.

Can you talk a little bit about the way that they have treated some of our water systems, trying to even upgrade systems that are even already right there?

Mr. PIRNER. Yes, Senator. I think you are talking about the Randall Rural Water System.

Senator ROUNDS. I am.

Mr. PIRNER. Which has a surface water intake in the Missouri River. They want to do some upgrade and they really have been unable to at this point because of this access issue. No easement. There is an existing line, there is an existing uptake. They just simply want to upgrade and make better their system, but to date they have been refused access to even do that.

Senator ROUNDS. This was more than just one or 2 months?

Mr. PIRNER. I believe so, yes, sir.

Senator ROUNDS. Like perhaps years?

Mr. PIRNER. I don't know the exact time. All I know is they are still waiting.

Senator ROUNDS. How about the city of Pierre?

Mr. PIRNER. The city of Pierre has an interesting little project. Again, the Missouri River borders the city, the capital of South Dakota. The river is an important aspect, part of the whole city. I mean, again, it is there and people use the Missouri River extensively. The city was looking at cutting its water costs, plus the State government. The State campus is there as well. They were going to do a joint project, put in a pump station, irrigate the city's green space plus the entire State campus with water directly from the river, thereby saving time and money and costs.

Senator ROUNDS. Watering the lawn.

Mr. PIRNER. Yes, sir. That would be correct. Or irrigation. We tried to say that it was irrigation, but so far that hasn't worked yet either.

But, anyway, again, we issued them a water right to do that, I think 2 years ago.

Senator ROUNDS. Within the existing flow of the Missouri River.

Mr. PIRNER. Exactly. And about 2 years ago, I think it was. At this point in time the Corps has been unresponsive to granting an easement across the take line for them to install that pump station.

Senator ROUNDS. So, do you think, based on that, if we had the Corps with their projects in place, with this approach right now, could we have even begun to develop the State of South Dakota along the Missouri River, basically 500 miles? Under these conditions, could we have even access to begin creating towns along the Missouri River based upon the current policy that the Corps has?

Mr. PIRNER. No, sir, I don't believe so. We have towns both near and far that are relying on the Missouri River today for their water supply source. I talked about 27 percent of the water systems. That equates to over 22 percent of our entire population is drinking Missouri River water. If you add in Lewis and Clark Regional Water System, which relies on wells alongside the river, that is about another 225,000 people. They don't have a surface water intake, but their wells are certainly directly influenced by the flow in the Missouri River.

So, all of those systems are using water that we believe have been allocated to them by the State through our existing water rights process. Under this system that is being proposed, either the Corps would have to approve, basically would have veto power over any State water right that we would issue, or would have to find some mechanism to try to fit those systems into their new policy.

Senator ROUNDS. On the other hand, I want to bring this to bear. What we are actually getting at here, if I understand it correctly, since they basically have purchased land along the river in order to create the mainstem dam of the Missouri River, the mainstem dam system, the Pick Sloan project, they have purchased land and now, in order to get access to the water, you have to have an easement to get across their land.

There are a couple of miles there in which we have natural flows, and which the Corps does not have that particular land right, so in those particular cases, since they are in the normal flow area of the Missouri, and we probably run 30 to 35,000 cubic foot per second, average year-in, year-out, through the Missouri River system, someone could, if they didn't have to cross Corps land, go directly back in with an appropriate State water right or approval, access that water. But since the Corps has this access land along it, they have prohibited, since 2008, development along the river because they were not issuing access across the land, which they had to the water, which the State has and is identifying as their responsibility to determine water rights for.

Mr. PIRNER. Yes, sir, that is correct.

Senator ROUNDS. Thank you.

Senator BOOKER.

Senator BOOKER. Keep going.

Senator ROUNDS. I would. I think this is the crux of the issue, and I am just curious.

Mr. Mulligan, I have a question for you. I appreciated your layout of the history on this. Under the equal footings, all States now come in to our Country with equal footings with the other States that were there to begin with. The original 13 States making up the original United States clearly protected their water sources. They clearly issue water rights today.

In your research, have you found other areas where the Corps is restricting access to free-flowing rivers or to other reservoirs in which they may have an interest, or are they prohibiting the access to those in other States other than on the Missouri River at this time? Can you share with us a little bit about their history of trying to do that?

Mr. MULLIGAN. Thank you, Mr. Chairman. The proposed rule here would be a rule of nationwide application, and the changes in the Corps' policy over the last decade or so are also, by and large, the ones that have been referenced today are of nationwide application, so these aren't changes or proposed changes that are just being applied in a certain area of the Country. So, just in terms of the Corps' policy, this is something that is not localized.

In terms of the equal footing doctrine, I think that it has been correctly described. When a new State joined the Union, it entered with the same rights, the same water rights as the original 13 colonies. In doing research, the Corps has sort of analyzed that, and in looking to the water rights of those original 13 colonies, the Supreme Court has said, in certain circumstances, the Federal Government through the Commerce Clause power may exercise rights over those original 13 colonies, over their water rights.

So, when a new State comes in and steps into equal footing, it also sometimes gives way to the Federal Government's Commerce Clause powers.

Senator ROUNDS. I am just curious. In the Flood Control Act of 1944, which is the authorizing act which created the mainstem dams on the Missouri River, there was a discussion at that time, and when the law passed Congress, was there specific mention of the States' water rights which were there? Could you kind of go

through that again with us, a little bit about the folks who wrote the law, the 1944 Act, could you share a little bit?

I know you mentioned it, I believe, and I will come to Mr. Scott next, but can you go through and share with us a little bit about what the intent was, or at least what was stated within that law with regard to the Federal Government utilizing those water resources, or controlling them?

Mr. MULLIGAN. Thank you, Senator. You are correct that in the Flood Control Act of 1944 there was discussion in the congressional Record in terms of the debate over how to effectuate the Pick Sloan project and how to incorporate that project into legislation. There is debate over how to protect, at best, recognize and protect State rights. That debate manifests itself in Section 1, to a certain degree in Section 1 of the Flood Control Act, which has a statement of congressional purpose that I read in my opening testimony that expressly recognizes Congress's position to recognize the primacy of State rights to control navigable waters within their borders.

Senator ROUNDS. The primacy of the States' rights to control the water within their borders on these navigable waterways.

Mr. MULLIGAN. I am not quoting now, I don't have the language in front of me, but a general statement to that effect.

Senator ROUNDS. I think what I am getting at is the gist is the folks who wrote that law to create the dam system appears to me to clearly have tried to delineate and to reestablish, for anybody that wanted to read it, that they were recognizing the States' rights to access that free flow through that river system. Is there anything that gives you pause to that attempt?

Mr. MULLIGAN. Thank you for the question, Senator. There was a discussion of protecting States' rights. In terms of a discussion and use of the term natural flow, that is not something that you see in relationship to the Flood Control Act and it is not sort of a legal term of art that you see developed doctrinally. So, while there is a high level discussion, the term natural flow, trying to separate natural flow from surplus waters is not prominent in the record.

Senator ROUNDS. Thank you.

Mr. Scott, same question, basically. Within the 1944 Flood Control Act, or the other acts that have been established since then, it would appear to me that Congress has worked very hard to try to make it clear that the States still maintained their responsibility and authority over water rights within their States. Can you elaborate a little bit on what you have been able to determine in your research?

Mr. SCOTT. Thank you, Senator. We feel that the 1944 Flood Control Act, as well as several Federal statutes, recognize that State authority and try to preserve it. We feel that while surplus water is an ambiguous term in that statutory language that the Corp does have authority to interpret, they should be guided by that clear intent of Congress to preserve State authority over water resources and allocation.

Senator ROUNDS. Thank you.

Secretary Pirner, same question. With regard to the research that you have done and the work that has been decided within the activities that you have been involved with, court cases and others, and the research with regard to the critical language found within

the 1944 Act, the other pertinent acts, do you find where there was clear evidence that Congress was doing its best to protect the interests of the States in determining water uses along these rivers, regardless of whether or not the Corps had access rights?

Mr. PIRNER. Yes, Senator. If you look at Section 1, that was talked about, of the 1944 Flood Control Act, it states, and I will quote, I am using a paraphrase here, but this is a quote: "It is 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." So, we believe that that language clearly preserves the States' rights that have been talked about again. That was, again, Section 1 of the 1944 Flood Control Act.

I think the other issue to consider, and we have touched upon it very briefly, is the upper basin States paid a heavy price for those reservoirs. You talked about losing 500,000 acres of our best fertile bottom and, never to be seen again. We were supposed to get irrigation as part of the payment for the permanent loss of those lands, but that has never occurred.

But I think if you take that into account, clearly, I don't think Congress would have passed the 1944 Flood Control Act by giving the Federal Government total control, then, over essentially all of the flow in the Missouri River that flows through South Dakota.

Senator ROUNDS. Would it be fair to say that the inflexibility that happens at the Federal level when you try to do a one-size-fits-all, would it have been manifested in 2011? In 2011 we had a flood on the Missouri River. It occurred because of substantial rain, heavy snowfall, and a delay, in my opinion, in the release of water trying to save downstream States, and rightfully so, trying to help folks by holding as much water as possible in the upper mainstem dams.

We ended up having water flows through the Missouri River system closing in on 160,000 cubic feet per second, which rose probably three to four feet above flood stages throughout the entire system. The damage was significant.

And the reason why I asked the question, even during this time in which we had flood waters flowing through the area, there was a request to utilize a limited amount of water out of the mainstem dams, which at this point were over flood stage and we had nearly a free-flowing Missouri River.

Secretary Pirner, can you share what the response from the Corps was, once again during a time of flooding in which we didn't have enough capacity to even hold the water, as to how inflexible the ability to get permission to even access, to get a limited amount of water out of the Corps reservoirs? Just for emphasis.

Mr. PIRNER. Yes, Senator. Again, the Corps would not grant that access. And when you talk about a limited amount of water, I would call it miniscule. I mean, it would not have helped the flood. But here we are in flood stage. We are spending tons and tons of Federal, State, and local moneys building levees alongside the river, trying to protect the communities that were in harm's way, and to deny access to the river for some pumping for a contractor

who wanted to use it for a construction project just didn't make any sense.

Senator ROUNDS. Thank you.

Senator BOOKER. You have been very patient. Thank you, sir.

Senator BOOKER. Sir, I, first of all, want to thank the witnesses. A lot of people don't understand how important it is for folks like you to come down here and engage in this discussion and dialog on issues that are actually really, really important. One of my favorite authors is a woman named Alice Walker, and she says the real revolutionaries are always concerned with the least glamorous stuff; raising a child's reading level, filling out food stamp forms because folks have to eat, revolution or not. The real revolutionaries are always close enough to the people to be there for them when they are needed.

So it is really an honor to sit next to a man who was a former Governor, who is also now a Senator, who is not just about the large issues we are all seeing on TV, but really in the weeds on issues that are really important to the people in his communities, and something as important as this.

And I am grateful for you all taking some time out, traveling long distances to come down here.

The last thing I will say, Mr. Chairman, is that, as a New Jersey Senator, I know that my Governor can't get into the Western Governors' Association, but he is from western New Jersey. I don't know if that counts.

But, in many ways, as different as our topography or our Nation is, we actually do share common values and common ideals, and I heard that those were expressed today by a lot of people, about local folks often know how to make the best decisions for what is important to them, so it was refreshing. I learned a lot in this hearing. I did not know what surplus water was, sir, before I did my reading last night, and I just want to say what an honor it is to sit next to you and listen to you talk about such an important issue for your community.

Senator ROUNDS. Thank you, Senator. Look, let me share with you. It has been a very busy day and I think most of us have had 25 to 28 different events, including Senator Booker. He has taken time to come in so that we can do this. We don't do a hearing without having both sides represented on these, and Senator Booker is taking time out of his very busy day to come in, recognizing that, for many of us, this is a Missouri River issue, as an example.

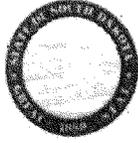
So, Senator, I want to thank you for the time that you have taken out of a very busy schedule to come and participate so that we can share this with the rest of the Country, and I thank you for that, sir.

At this time I would ask unanimous consent to not only include all of your statements for the record, but I would also ask unanimous consent that four letters from Governor Duggaard to the Army Corps be submitted and accepted; a letter from Governor Duggaard to the South Dakota congressional Delegation; a letter from Governor Duggaard, Senator Thune, Representative Noem, and myself to President Trump; a letter from the South Dakota Department of Game, Fish, and Parks to the Army Corps; a letter from the South Dakota Association of Rural Water Systems to this

subcommittee; a letter from the Western States Water Council to the Army Corps; a letter from the National Water Supply Alliance to this subcommittee.

Without objection, so ordered.

[The referenced information follows:]



STATE OF SOUTH DAKOTA  
DENNIS DAUGAARD, GOVERNOR

October 4, 2012

U.S. Army Corps of Engineers, Omaha District  
CENWO-PM-A  
Attn: Missouri River M & I Water Storage Reallocation Study  
1616 Capitol Avenue  
Omaha, NE 68102-4901

Dear Sirs,

Thank you for the opportunity to provide comments as part of the scoping process about the proposed reallocation studies for the Missouri River mainstem reservoirs. As was stated on August 27, 2012, in Pierre at both the public hearing and at the meeting between the Corps and state officials, the state of South Dakota is disturbed with the direction the Corps is taking regarding their attempt to market water from the Missouri River Reservoirs. I find it especially disturbing the Corps is choosing to operate in such an expedited time frame during this process. The Corps has waited more than 50 years since the 1958 Water Supply Act and expects comments in 30 days.

The state offers the following comments as part of the scoping process for the proposed reallocation studies for each of the mainstem reservoirs and the Corps' water marketing plan in general. Please consider these comments and include them in the administrative record.

The Corps has authority to dedicate pools in the reservoirs to store water for congressionally authorized purposes. The Corps Master Manual refers to these authorized purposes as "flood control, navigation, hydropower, water supply, water quality, irrigation, recreation, and fish and wildlife." 2006 Master Manual 4-02. At present, the storage for authorized purposes is allocated to a multiple use pool, excluding the permanent pool (meant for silt storage) and the exclusive flood control pool. Municipal and industrial uses are in the multiple use pool. There is no need to create separate pools for each type of use; the volume of water in the reservoirs simply does not dictate doing so.

The pending Corps proposal is couched as a plan to "reallocate" not only storage, but also the use of water and exceeds the Corps' legal authority. The Notice of Intent for the pending allocation study states "the 1944 Flood Control Act, as amended, directed the USACE to allocate the river's resources among the authorized Missouri River project purposes." The 1944 Flood Control Act made no such direction. The states have authority to allocate the water resources, not the federal government, and the 1944 Flood Control Act, Section 1, recognizes the

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applicability of state water laws. Similarly, the 1958 Surplus Water Act, Sections 301(a) and 301(c) recognize the applicability of state granted water rights.

The Corps lacks authority to adjudicate water rights or allocate use of the waters of the state among appropriators within the state, a function reserved to the state of South Dakota and its courts. When the federal government is involved, the McCarren Act applies. 43 U.S.C. § 666.

The Corps also lacks authority to allocate use of water among the states and tribes, a function that it purports to exercise in whole or in part through its attempt to reallocate water in the mainstem system. These allocations are undertaken through compacts among states and tribes and/or original proceedings in the United States Supreme Court.

Under this proposal, the Corps would control management of the water used for current and future municipal and industrial use. Basin states have long enjoyed the right to issue water permits for the use of Missouri River water. The ability for states to manage their own water supplies for the benefit of their citizens is a state's right that has long been recognized by the federal government. This study must recognize the state's role in granting water rights.

The Corps' proposed action also exceeds its legal authority in claiming all water in the mainstem reservoirs is project water or stored water while ignoring the natural flow component of the Missouri River. Natural flows are those flows that exist in the river absent the reservoirs. The Corps' claim not only ignores the history of water flows in the Missouri River before the Missouri River Basin Project, but fails to recognize that natural flows have not ceased. The Corps' effort to federalize natural flows ignores the balance of state and federal interests articulated in the 1944 Flood Control Act and other federal legislation, as well as longstanding state ownership of water stemming from the equal footing doctrine.

A distinction must be recognized between the nature of nonproject water, such as natural-flow water, and project water, and between the manner in which rights to use such waters are obtained. Right to use of natural-flow water is obtained in accordance with state law. *Israel v. Morton* 549 F.2d 128, 132 (9<sup>th</sup> Cir. 1977). It is not federal project water. *Id.* On the other hand, federal project water is dependent on federal law to a certain degree, since it would not be available for use "but for the fact that it has been developed by the United States." *Id.*, *Kittitas Reclamation District v. Sunnyside Valley Irrigation District* 626 F.2d 95, 99 (1980). Even the federal regulation of federal project water is not absolute; the state still has authority to regulate withdrawals of water from storage in federal projects. *Id.*, *California v. U.S.* 438 U.S. 645 (1978).

The allocation of costs for building the reservoirs is done. The 1944 Flood Control Act authorized an initial allocation of repayments for building the reservoirs. The 1944 Flood Control Act § 9(c) authorized allocation of costs to "the reclamation and power developments"

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undertaken by the Interior Secretary under the Act (to the "transmission lines and related facilities" that § 5 authorizes the Interior Secretary "to construct or acquire" for transmitting and disposing of electric power). *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 108 S.Ct. 805, 98 L.Ed.2d 898(1988). It also authorized allocation of costs to the "irrigation works" that § 8 authorizes the Interior Secretary "to construct, operate, and maintain" under the reclamation laws. *Id.* As seen Section 9 (c) refers only to allocations of costs and repayments by energy users and irrigators and does not include any mention of repayment by other authorized users. *Id.* There is no congressional authority to charge other users for costs of construction.

A reallocation of costs cannot occur absent congressional authorization. In 1977 when the power functions of the mainstem reservoirs were transferred from the Bureau of Reclamation to the Department of Energy, Congress was concerned the change would prompt an administrative reallocation of costs for multiple purpose reservoirs. South Dakota Senator McGovern proposed the following amendment which ultimately became part of the Department of Energy Reorganization Act:

Neither the transfer of functions effected by paragraph (1)(E) of this subsection nor any changes in cost allocation or project evaluation standards shall be deemed to authorize the reallocation of joint costs of multipurpose facilities theretofore allocated unless and to the extent that such change is hereafter approved by Congress."

42 U.S.C. § 7152(3). Senator McGovern explained that "Congress had carefully evaluated the financial aspects of the total project in previous years," including approval of financial reports and recommendations and that it was therefore "proper to protect the allocation of joint costs on all projects when they have been made in Congress" including, specifically, those pertaining to the Missouri Basin project. 123 Cong. Rec. S15300 (daily ed. May 18, 1977).

The Notice of Intent cites to the 1958 Water Supply Act as authority to conduct the allocation study and to charge fees for storage. The 1977 McGovern amendment precludes the Corps from administratively reallocating the joint costs of multiple use facilities, since the allocations were already "made in Congress."

The Notice of Intent also indicates the Corps intends to "make a change in the use of storage" so as to invoke the surplus fee requirements of the 1958 Water Supply Act. Such reallocation cannot, of course, require the imposition of fees unless the project is an actual constructed modification of the dams and the parties agree to such fees in advance, neither of which applies here. The maximum repayment period also bars imposition of costs by the Corps for original construction. 43 U.S.C. 390b.

If Congress authorizes the Corps to perform a reallocation study for the Missouri River mainstem system, we request the United States Bureau of Reclamation be granted cooperating agency status and participation in producing the study. Reclamation has experience and an understanding of western water law and how water is managed in large reservoir systems in the

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Western states. They are the agency with experience in calculating fees for operations and maintenance, having done so for many Reclamation projects throughout the west. They routinely distinguish between natural flows and stored water available for contract.

South Dakota permanently lost more than 500,000 acres of its most fertile river bottom lands when the reservoirs were filled. While we received benefits, we also paid a very high price in return for federally promised irrigation which never occurred. This pursuit of Missouri River water allocation, ignoring congressional recognition of states' rights to develop water supplies and to manage natural flows, is offensive.

Thank you again for the opportunity to provide comments in regard to the Missouri River mainstem reservoir reallocation study. The state of South Dakota asks the Corps continue to provide information to the state about the status of this matter if it moves forward. I also ask the Corps to provide the state with a draft scope of work and that the state be afforded an opportunity to provide input.

Sincerely,



Dennis Daugaard

DD:nn

cc: Senator Tim Johnson  
Senator John Thune  
Representative Kristi Noem



STATE OF SOUTH DAKOTA  
DENNIS DAUGAARD, GOVERNOR

October 9, 2012

Larry Janis  
U.S. Army Corps of Engineers, Omaha District  
CENWO-OD-T  
Attn: Surplus Water Report and EA  
1616 Capitol Avenue  
Omaha, NE 68102-4901

Dear Mr. Janis,

We thank the Corps for allowing us to provide written comments on the following draft surplus water reports for the Missouri River mainstem reservoirs:

1. Draft Oahe Dam/Lake Oahe Project South Dakota and North Dakota Surplus Water Report (and attached Environmental Assessment).
2. Draft Big Bend Dam/Lake Sharpe Project South Dakota Surplus Water Report (and attached Environmental Assessment).
3. Draft Fort Randall Dam/Lake Francis Case Project South Dakota Surplus Water Report (and attached Environmental Assessment).
4. Draft Gavins Point Dam/Lewis and Clark Lake Project Nebraska and South Surplus Water Report (and attached Environmental Assessment).
5. Draft Fort Peck Dam/Fort Peck Lake Project Montana Surplus Water Report (and attached Environmental Assessment).

As was stated at the August 27, 2012, public meeting in Pierre, the state of South Dakota is very concerned with the direction the Corps has chosen to take in regard to their attempt to market water from the Missouri River reservoirs. Below are our comments for all five of the draft surplus water reports. Please consider these comments and include them in the administrative record for each project.

Each of the draft surplus water reports is deficient as it fails to allow stakeholders the opportunity to provide meaningful comment. The reports were issued on August 6, 2012. The issues presented in the reports involve complex legal and factual issues, prompting lengthy and thorough study of a number of issues in order to respond, including: (a) the intent and applicability of the surplus water provisions in the 1944 Flood Control Act ("1944 FCA"); (b) the intent and applicability of the surplus water provisions in the 1958 Water Supply Act ("1958 WSA"); (c) the background on the Corps' several previous water marketing proposals in the 1960s through the 1990s; (d) review and analysis of the quantification of "surplus water" in each

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of the draft surplus water studies; and (e) review and analysis of the several repayment calculations used for each of the six draft surplus water studies. The current surplus water reports should not be considered unless or until the Corps provides further opportunity for response.

Each of the environmental assessments fails to comply with the requirements of the National Environmental Policy Act ("NEPA"), 42 U.S.C.A. § 4321, et.seq. and rules promulgated thereunder. An EIS should be prepared before further considerations.

Each of the draft surplus reports fails to recognize state authority and ownership of water and the bed of the Missouri River and its navigable tributaries within the state's boundaries, authority which accrued to the state at statehood under the Equal Footing Doctrine. *See, PPL Montana, LLC v. Montana* \_\_\_ U.S. \_\_\_, 132 S.Ct. 1215, 182 L.Ed.2d 77 (2012).

The states have the right to issue water permits for use of Missouri River water. The ability for states to manage their own water supplies for the benefit of their citizens is a state's right that has long been recognized by the federal government. In fact, the 1944 Flood Control Act, Section 1, recognizes the applicability of state water laws. Similarly, the 1958 Surplus Water Act, §§ 301(a) and 301(c) recognize the applicability of state granted water rights. While the Corps purports to recognize state granted water rights, the actual reports conflict with that requirement by federalizing the water itself. Indeed, the Corps now attempts to control management of the water used for current and future municipal and industrial use. This is contrary to longstanding water law.

The Corps' action is barred by the Commerce Clause of the United States Constitution and the 10<sup>th</sup> and 14<sup>th</sup> Amendments to the Constitution.

The Corps' proposed action wrongly assumes that all water in the mainstem reservoirs is project water or stored water while ignoring the natural flow component of the Missouri River. Natural flows are those flows that are in the river absent the reservoirs. These flows are subject to state jurisdiction alone.

The Corps lacks authority to allocate use of water among the states and tribes, a function reserved to the United States Supreme Court or compacts authorized by Congress. The Corps also lacks authority to adjudicate water rights or allocate use of the waters of the state among appropriators within the state, a function reserved to the state of South Dakota and its courts. When the federal government is involved the McCaren Act applies. 43 U.S.C. § 666.

The draft surplus reports are intended to "quantify the surplus water available in each of the reservoirs" for surplus water agreements "until a permanent reallocation study is completed." (July 7, 2012 News Release). As such, the proposed "surplus water contracts" are intended to quantify actual municipal and industrial uses of water from the Missouri River reservoirs so the

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quantification can be used in an eventual "reallocation" of the rights to use water from the Missouri River reservoir. However, because the Corps lacks authority to allocate the use of water, it also lacks authority to develop a system of contracts for the purposes of undertaking an allocation, as it is doing in the present "surplus water" plan.

The Corps claims the surplus water reports (and surplus water management system arising from them) are authorized by the 1944 FCA and implies that the 1944 FCA authorizes reallocations as well. The 1944 FCA does not include this authority. Section 9 (c) refers only to allocations of costs and repayments by energy users and irrigators and does not include any mention of repayment by other authorized users, let alone reallocation of uses of water in the reservoirs.

Instead of the foregoing authority pertaining specifically to the Missouri River Basin Project, the Corps relies on the 1944 FCA §6 which relates to all projects authorized across the nation for the post-war development, not just the Missouri River mainstem reservoirs as is addressed in § 9(c). Section 6 authorizes the Secretary of War to make contracts "at such prices and on such terms as he may deem reasonable for domestic and industrial uses for surplus water that may be available at any reservoir under the control of the Water Department: *Provided*, that no contracts for such water shall adversely affect the existing lawful uses of water." Section 6 does not authorize a reallocation of water or authorize use of surplus water contracts as part of the method to reallocate water.

The definition of surplus water in the 1944 FCA, §6 has been interpreted to mean "water the [Secretary of the Army] determines is not needed to fulfill a project purpose in Army reservoirs." *ETSI*, 484 U.S. at 506, 108 S.Ct. at 812.

Serious doubts arise on whether the provisions of Section 6 even applies when M&I is already authorized for reservoirs. The GAO has held that Section 6 applies only to surplus water for M&I when M&I water supply is *not* otherwise an authorized reservoir purpose. GAO, *Water Resources: Corps Lacks Authority for Water Supply Contracts*, p. 2, 11 (August 1991) ("When M&I water supply is not an authorized reservoir purpose the Corps may provide surplus water for M&I purposes under section 6 of the Flood Control Act of 1944"). Some of the other projects authorized under the 1944 FCA do not have either municipal or industrial uses as authorized reservoir purposes. This section applies to them. Under this interpretation, Section 6 would not apply to surplus water for municipal and industrial use from the Missouri River mainstem reservoirs since they are already authorized, and therefore, no surplus water fees could be charged.

The 1944 FCA § 6 provides that "no contracts for such water shall adversely affect then existing lawful uses of such water." Each of the draft surplus reports reveals, however, that the Corps intends to prohibit the state, its agencies, and its citizens (all of whom hold quantified or permitted water rights) from using water for beneficial purposes unless or until the Corps issues a surplus water contract. As such, implementing the current reports would subvert the very

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intent of this “no adverse effects” provision since it would adversely affect the very “existing lawful uses” that it is designed to protect –by prohibiting exercise of those lawful uses–until) or unless the water users obtain federal permission to use them (and enter into unilateral contracts with the Corps).

The five reports include imposing the costs of the initial construction in surplus water contracts under Section 6. The 1944 Act does not contemplate doing so and to do so is contrary to the legislative history of the 1944 Act, and, in particular, Section 9.

In addition, as the Corps apparently recognizes, it also lacks authority over allocation or contracts for municipal water supply or rural water projects overseen or funded by the Bureau of Reclamation or directly under the Secretary of Interior including, but not limited to the following: Act of September 24, 1980, 94 Stat. 1171, PL 96-355, § 9 (WEB Water System under Reclamation); Act of October 30, 1992, 106 Stat. 4600, PL 102-575 (Mid-Dakota Rural Water System under Reclamation); Act of October 24, 1988, PL 100-516, 102 Stat. 2566 (Mni Wiconi Rural Water Supply Project under Interior); Act of July 13, 2000, PL 106-246 (Lewis and Clark Rural Water System Act under Interior and Reclamation).

In addition to all Bureau projects, no other irrigation (irrigation by private parties or other state authorized irrigations entities) is subject to Corps authority over surplus water.

Although the Corps indicates the basis for its plan is the 1944 FCA, the surplus water reports refer at various places to the 1958 WSA, now codified at 43 U.S.C. §390b. Further, the related “reallocation” being undertaken by the Corps (July 19, 2012 Notice in Vol. 77 FR 42486-42487) is based on the 1958 Act.

There is a serious question as to whether or to what extent that the 1958 WSA constitutes sufficient authority for the Corps to reallocate water. *In Re: MDL -1824 Tri-State Water Rights Litigation* 644 F.3d 1160, 1196 (11<sup>th</sup> Cir. 2011). Even the Corps itself has vacillated as to how to approach the issue. *Id.*

The surplus water reports directly contravene the 1958 WSA, which indicates the federal government is to *cooperate* with the states and the five reports at issue make it apparent that the Corps’ intent is to federalize water rather than to cooperate with the state.

The surplus water reports (and surplus water management system arising from them) are in conflict with the surplus water fee provisions in the 1958 WSA. This provision contemplates that prior to construction or modification of a multiple purpose project, the Corps will obtain cost-sharing payment agreements from local interests that will use water storage in the project. Only when such agreements are reached, may the water users be required to pay for costs of construction (and only for 30 years). The surplus water reports do not identify any preexisting agreements prior to construction that trigger the use of water supply contracts under the 1958 WSA.

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There is no construction or modification involved in either the present surplus water reports or the related "reallocation study" noticed for study in July 2012. As stated by the Comptroller General in 1990 and again by the General Accounting Office (GAO) in 1991, the 1958 provisions that allow for allocating water and imposing costs on "modifications" of reservoirs are designed only to address fees for physical construction or expansion of reservoirs. In other words, an "allocation" is not a "modification." GAO, *Water Resources; Corps Lacks Authority for Water Supply Contracts*, p. 5 (August 1991); *Town of Smyrna v. United States Army Corps of Engineers*, 517 F. Supp.2d 1026 (M.D. Tenn. 2007) (vacated pursuant to settlement). The apparent plan is to use surplus water contracts as "preexisting contracts" to serve as a foothold to gain authorization under the 1958 WSA for later unilateral imposition of fees. Neither the current surplus water reports nor the related allocation studies can serve such a purpose and this idea should be rejected.

A reallocation of costs cannot occur absent congressional authorization. In 1977, when the power functions of the mainstem reservoirs were transferred from the Bureau of Reclamation to the Department of Energy, Congress was concerned the change would prompt an administrative reallocation of costs for multiple purpose reservoirs. Accordingly, South Dakota Senator McGovern proposed the following amendment which ultimately became part of the Department of Energy Reorganization Act:

Neither the transfer of functions effected by paragraph (1)(E) of this subsection nor any changes in cost allocation or project evaluation standards shall be deemed to authorize the reallocation of joint costs of multipurpose facilities theretofore allocated unless and to the extent that such change is hereafter approved by Congress."

42 U.S.C. § 7152(3). Senator McGovern explained that "Congress had carefully evaluated the financial aspects of the total project in previous years," including approval of financial reports and recommendations and that it was therefore "proper to protect the allocation of joint costs on all projects when they have been made in Congress" including, specifically, those pertaining to the Missouri Basin project. 123 Cong. Rec. S15300 (daily ed. May 18, 1977). The 1977 McGovern amendment precludes the Corps from administratively reallocating the joint costs of multiple use facilities, since the allocations were already "made in Congress."

The Corps has never charged fees for natural flows from the Missouri River reservoirs in the past. The Corps itself has referred to the fact that natural flows are to be considered differently than stored water. Among those sources is the 1987 EM 1110-2-3600 Management of Water Control Systems Engineering and Design manual which states that "M&I water may be withdrawn from reservoirs under contractual arrangement that do not involve a commitment for the use of the reservoir's storage space. These withdrawals are considered to be *from natural flow* or from water in excess of the needs for other project functions." While South Dakota does not agree contracts for surplus water are necessary for natural flow withdrawals, the "contractual arrangements" at issue may speak to easements for land. It is apparent from this reference that the Corps acknowledges natural flows exist.

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Similarly, the 1958 Chief of Engineers report, Missouri River Main Stem Reservoir System Allocation of Costs Section 3-08 states "Since the primary attention in setting operational criteria of the Main Stem Reservoir System for main stem water supply and stream sanitation has been on preservation of critical minimum flow levels *no lower than the lowest ordinarily experienced on the river prior to the reservoirs, it is considered that no costs should be allocated to water supply and stream sanitation.*" The five reports currently being considered contradict this understanding that flows that would be present absent the reservoir are natural flows not subject to Corps fees.

Upon reviewing the multiple reports, there is an extremely large variation in the amount the Corps would charge for surplus water at one reservoir versus another. These amounts varied from a high of \$174.66 per acre-foot of yield from Lewis and Clark Lake to a low of \$17.19 per acre-foot of yield from Lake Oahe. This difference is extreme and may lead to contracting entities avoiding certain geographic regions due to the cost of obtaining water or penalizing existing residents because of where they live. This fault is derived largely from the Corps' erroneous decision to include costs of construction in the five reports. Even without the costs of construction, the more equitable method would be to equalize the cost for contracted water over the entire mainstem system.

The method shown in the surplus water reports to allocate cost to M&I use is flawed. An alternative method the Corps has used is the Separable Costs Remaining Benefits Method as spelled out in the 1958 Chief of Engineers report, Missouri River Main Stem Reservoir System Allocation of Costs Section 8-03, which calls for an equitable distribution of costs among the functions that the Corps' projects are designed to serve. Overlapping functions were considered when calculating repayments; i.e., that the allocation of costs to energy necessarily considers the use of energy for irrigation. In other words, some stored water is used for M&I but it is also used for flood control and other purposes. The distribution provides, of course, that costs for some functions are to be absorbed by the federal budget. Others, such as those for energy, are to be recovered.

The Corps' position in the 1958 Report is that the "cost of authorized M&I water supply storage in new and existing projects will be the total construction cost *allocated to the water supply storage space*" not the costs for other functions or other storage. This analysis demonstrates the Corps itself has related M&I costs to *stored water*, not natural flows. The five reports contradict these previous considerations.

In chapter 3 of each of the five reports at issue, the construction costs for each of the reservoirs were calculated; however, some specific costs were excluded from the calculations based on use. Since the authorizing legislation exempted reimbursement for certain uses such as flood control, the surplus water reports excluded specific costs associated with flood control from the cost analysis. Flood control works "include channel improvements and major drainage improvements." 1944 FCA, § 2. However, not all flood control uses were discounted from this analysis.

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Because the flood control component was paid by the taxpayers at the time of construction, that portion of the facilities was "paid for" in the 1950s and 1960s. However, the current plan is for M&I users to now pay a portion of capital expenses such as the main dam, reservoirs, roads and bridges, buildings and grounds, permanent operating equipment, and relocations- even though these facilities are an integral part of the flood control operations. Also, hydropower users have long been required to reimburse the Treasury for their specific costs, including "amortization of capital investment allocated to power over a reasonable period of years." 1944 FCA, §5. Yet, the draft surplus water reports indicate that upstream M&I users would now be responsible for repayment of a share of the costs (as updated with interest) for such capital expenses as the main dam, reservoirs, roads and bridges, buildings and grounds, permanent operating equipment, and relocations, even though the hydropower use also requires and has paid in whole or in part for such items. This analysis is flawed since it fails to explain or address how the hydropower revenue offsets (or does not offset) the capital investment for which repayment is now sought from M&I users.

The upstream states have already paid, and continue to pay, a heavy price for the Missouri River reservoirs. Even though we receive many benefits from the construction of the reservoirs, South Dakota permanently lost more than 500,000 acres of its most fertile river bottom lands when the reservoirs were filled. The federally promised irrigation to help offset this loss never occurred. Now requiring only the reservoir M&I users to be responsible for construction, operation, and maintenance costs of the reservoirs is illegal and illogical.

Thank you again for allowing us to provide written comments in regards to the Missouri River mainstem reservoir surplus water reports.

Sincerely,



Dennis Daugaard

DD:nn

cc: Senator Tim Johnson  
Senator John Thune  
Representative Kristi Noem



STATE OF SOUTH DAKOTA  
DENNIS DAUGAARD, GOVERNOR

August 27, 2012

Colonel Anthony C. Funkhouser  
Commander, Northwest Division  
U.S. Army Corps of Engineers  
P.O. Box 2870  
Portland, OR 97208-2870

Dear Colonel Funkhouser,

I would like to again congratulate you for the honor of being selected as the new Commander of the Northwestern Division of the U.S. Army Corps of Engineers. I have no doubt your experience and leadership will serve the Division well. I have had a strong working relationship with the Corps of Engineers since I have been Governor, and I look forward to working with you and continuing that relationship.

I also write to reiterate my desire to create a partnership through which we can improve the plains snowpack monitoring system for the Missouri River basin. One of the lessons learned from the devastating flooding of 2011 is that our current system is inadequate. The flooding to some degree may not have been preventable. However, if we had a better plains snowpack monitoring system, we would have had earlier warnings that could have given us more time to prepare and mitigate the impact. In the future, an improved monitoring system will help mitigate flooding.

During a meeting between the Governors from the Missouri River basin states and the Corps of Engineers in Bismarck, North Dakota, last May, I expressed my commitment to improving the plains snowpack monitoring system capabilities. General McMahon suggested a memorandum for all interested parties to outline shared responsibility. I believe it is now time to develop such a formal agreement.

Doug Kluck from the National Oceanic and Atmospheric Administration (NOAA) was also at the meeting. Doug recommended we work through the Western Governors' Association (WGA). Tom Iseman from the WGA has agreed to be the contact person.

I realize improving the monitoring system will require substantial funding. The state of South Dakota is committed to sharing in the cost to improve the system. The state is also committed to partnering with other states, the Corps of Engineers, NOAA, and other interested parties to accomplish the objective of improving the system.

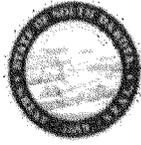
I look forward to working with you on this very important issue. If you have any questions, please do not hesitate to contact me.

Sincerely,

A handwritten signature in cursive script, appearing to read "Dennis".

Dennis Daugaard

DD:nn



STATE OF SOUTH DAKOTA  
DENNIS DAUGAARD, GOVERNOR

March 15, 2017

US Army Corps of Engineers  
ATTN: CECC-L  
441 G Street NW  
Washington, DC 20314

**Docket COE-2016-0016**

**Proposed rulemaking: *Use of Army Corps of Engineers Reservoir Projects for domestic, Municipal & Industrial Water Supply***

Dear Sir,

Please accept this letter of comments from the state of South Dakota on the above referenced proposed rulemaking. With the caveat that our primary focus in reviewing the rule is the impact of the proposal on the Missouri River reservoirs, the state's water law, and the citizens' rights to use Missouri River water, **the proposed rule is unacceptable to South Dakota.**

Although the US Army Corps of Engineers states throughout the document their overall intent of the proposed rule is to avoid interfering with lawful uses of water under state law, simply stating this intent does not result in a rule that achieves it. The statement of intent is followed by more than 130 pages of information we can only summarize as contrary to the stated intent.

The US Army Corps of Engineers also attempts to write into rule the agency's legal authority to expand federal storage right claims and control over the allocation of all of the Missouri River water without regard to state water laws or the science and engineering of hydrology. They seek to re-write Congressional intent of the 1944 Flood Control Act and the 1958 Water Supply Act by attempting to memorialize in rule the US Army Corps Engineers' interpretation and wishful thinking of what Congress truly intended.

Below are detailed comments on the proposed rule, and taken collectively, are the foundation for South Dakota finding the rule unacceptable for the people of this state.

1. The proposed rule rejects the concept of natural flow of water in the Missouri River through the reservoirs and considers all water in the Missouri River reservoirs as stored

water and under the control of the US Army Corps of Engineers. South Dakota and the Western States Water Council have previously presented to the Corps and others why natural flows, which can be thought of as the natural flow of the river passing underneath water stored in the reservoirs and passing through as if there were no dams, must exist if states such as South Dakota which host the reservoirs are to have any Missouri River water left to appropriate for beneficial uses. Some of these documents are listed here and are enclosed to be a part of South Dakota's official comments on the proposed rule:

- [August 6, 2013 Western States Water Council Letter in Support of States' Rights to Manage Missouri River](#)
- [October 9, 2012 letter about Corps draft surplus water reports](#)
- [October 4, 2012 letter about Corps proposed reallocation studies](#)
- [August 27, 2012 letter for the Corps at their public meeting in Pierre](#)

Besides attempting to mandate a federal take-over of all our unappropriated natural flows, much of the existing appropriation of natural flows of the Missouri River by South Dakota pre-dates the Pick-Sloan Act and the construction of the Missouri River dams. The proposed rule in its current form threatens to strip away those water rights through future water supply agreements, renewal of access easements, and other processes for which the US Army Corps of Engineers has no authority.

US Army Corps of Engineers has more recently usurped the state's authority to grant the use of Missouri River natural flows by withholding access easements to the water. Many water right permits have been issued by the state, but because the permit holder lacks a water supply contract with the US Army Corps of Engineers, they cannot access the river water because the US Army Corps of Engineers is withholding the access easement (re: Real Estate Guidance Policy Letter No. 26). This is contrary to past US Army Corps of Engineers protocol because they have not charged fees for natural flows from the Missouri River reservoirs in the past. In fact, the US Army Corps of Engineers protocol directed the agency to consider natural flows differently than stored water in several previous documents. For example, the 1987 EM 1110-2-3600 Management of Water Control Systems Engineering and Design manual, states "*M&I [municipal and industrial] water may be withdrawn from reservoirs under contractual arrangements that do not involve a commitment for the use of the reservoir storage space. These withdrawals are considered to be from natural flow or from water in excess of the needs for other project functions.*"

- 2 As stated in the document, "*the proposed rule would define 'surplus water' to mean water available at any US Army Corps of Engineers' reservoir that is not required during a specified time period to accomplish an authorized purpose or purposes of that reservoir.*" Instead, this rule should direct natural flow be accounted for and factored out when determining surplus water or reallocation water from storage.

The US Army Corps of Engineers claims the authority to develop this water supply rule falls under Section 6 of the 1944 Flood Control Act (Section 6) and the water supply provisions in the 1958 Water Supply Act. There is no dispute Section 6 allows the US

Army Corps of Engineers to sell surplus water and although it was a hotly contested topic during the congressional hearings on the 1944 Flood Control Act, no definition of surplus water was ever established by Congress. While the Corps purports to recognize state granted water rights, the proposed rule conflicts with that requirement by federalizing the water itself. Indeed, the Corps now attempts to control management of the water used for current and future municipal and industrial use. This is contrary to longstanding water law, as the United States Supreme Court found in *California v. United States* (1978):

"While later Congresses have indeed issued new directives to the Secretary, they have consistently reaffirmed that the Secretary should follow state law in all respects not directly inconsistent with these directives. The Flood Control Act of 1944, 58 Stat. 888, for example, which first authorized the New Melones Dam, provides that it is the "policy of the Congress to recognize the interests and rights of the States in determining the development of watersheds within their borders and likewise their interests and rights in water utilization and control." Perhaps the most eloquent expression of the need to observe state water law is found in the Senate Report on the McCarran Amendment, 43 U.S.C. 666 (a), which subjects the United States to state-court jurisdiction for general stream adjudications: "In the arid Western States, for more than 80 years, the law has been the water above and beneath the surface of the ground belongs to the public, and the right to the use thereof is to be acquired from the State in which it is found, which State is vested with the primary control thereof.

"Since it is clear that the States have the control of water within their boundaries, it is essential that each and every owner along a given water course, including the United States, must be amenable to the law of the State, [438 U.S. 645, 679] if there is to be a proper administration of the water law as it has developed over the years." S. Rep. No. 755, 82d Cong., 1st Sess., 3, 6 (1951)

States' rights to natural flows of navigable waters within their borders are constitutionally founded, and protected, in the Equal Footing Doctrine. The Corps' action is barred by the Commerce Clause of the United States Constitution and the 10<sup>th</sup> and 14<sup>th</sup> Amendments to the Constitution. In the absence of Constitutional or Congressional delegation of authority to the federal government, state authority over its water resources is sovereign.

3. In the proposed rule, the US Army Corps of Engineers is expanding the definition of domestic and industrial uses beyond the authority Congress granted them in Section 6 and the Water Supply Act. We do not believe Congress delegated authority to the US Army Corps of Engineers to expand the definition of domestic and industrial uses in this manner. In this instance the US Army Corps of Engineers is proposing to expand the definition of domestic and industrial uses to include irrigation, which would have the effect of giving the Corps authority over irrigation use, rather than under the Secretary of Interior as was designated by Congress in Section 8 of the 1944 Flood Control Act.
4. If the US Army Corps of Engineers determines either surplus water or reallocated water is made available at a Corps facility for a domestic or industrial use, it could potentially be for only a short period of time and renewal of a water supply agreement will be at the discretion of the sitting Assistant Secretary of the Army at that time. Under the South Dakota water rights law water users are issued a water right for as long as they continue to put the water to beneficial use. Under the proposed rule, there is no guarantee for the water right holder that the Corps will be willing to renew the water

supply agreement upon its expiration. This creates uncertainty for the water right holder whose water source is an US Army Corps of Engineers' reservoir and will hinder development; this is an uncertainty that does not exist for holders of water rights from any other water source in South Dakota.

5. The rule is being proposed with the US Army Corps of Engineers' intent to coordinate surplus water determinations in advance with the applicable federal Power Marketing Administrations serving US Army Corps of Engineers' facilities that produce hydropower. This gives the Power Marketing Administrations too much authority in the determination of whether surplus water or reallocated water will be available and will allow them to pass on the cost of providing water to other water users. This is not fair to other water users nor has it been authorized by Congress.

Thank you again for allowing us to provide written comments in regard to the proposed water supply rule and your favorable reaction to our request, which is reiterated here:

**South Dakota respectfully requests the US Army Corps of Engineers to reject the current proposed rule and end this federal take-over attempt of nearly all the Missouri River water in South Dakota.**

Sincerely,



Dennis Daugaard

Enclosures:

- [August 6, 2013 Western States Water Council Letter in Support of States' Rights to Manage Missouri River](#)
- [October 9, 2012 letter about Corps draft surplus water reports](#)
- [October 4, 2012 letter about Corps proposed reallocation studies](#)
- [August 27, 2012 letter for the Corps at their public meeting in Pierre](#)

cc w/enclosures:

U.S. Senator John Thune  
U.S. Senator M. Michael Rounds  
U.S. Representative Kristi Noem  
Marty Jackley, South Dakota Attorney General  
Tony Willardson, Executive Director, Western States Water Council



STATE OF SOUTH DAKOTA  
DENNIS DAUGAARD, GOVERNOR

May 23, 2018

President Donald J. Trump  
The White House  
1600 Pennsylvania Avenue, NW  
Washington, DC 20500

Dear President Trump,

We want to congratulate you and your team on re-establishing cooperative federalism as the way to conduct business with the states. This has been a breath of fresh air. However, we are writing to alert you the US Army Corps of Engineers (Corps) is instead still focused on trampling state's rights under a President Obama directive. The instruments they are using to federalize our Missouri River water are called the proposed Water Supply Rule, Surplus Water Reports, and Reallocation Studies.

To put our opposition to the proposed Water Supply Rule into context, remember our people and Native American Tribes paid a heavy price for the four dams on the Missouri River in South Dakota. These large reservoirs permanently flooded more than 500,000 acres of our most fertile river bottomlands. Many citizens and tribal members were forced from their lands, their homes, and their communities. The promise of federal irrigation projects to help offset those losses never materialized.

Unfortunately, another payment was extracted from us in 2008 when the Corps issued Real Estate Guidance Policy Letter No. 2. This policy requires municipal and industrial water users to acquire a water storage contract prior to the Corps issuing an access easement to a Missouri River reservoir for a pump site, but the Corps had no process for issuing the contracts. Therefore, the effect of the policy was to place a moratorium on easements to the Missouri River reservoirs.

This moratorium hit South Dakota hard, because out of a thousand miles of Missouri River shoreline, only about one hundred miles are on the two short free-flowing stretches in the state. Therefore, ninety percent of our shoreline became off limits to potential users of Missouri River water, and this moratorium is still being implemented

President Trump  
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May 23, 2018

by the Corps. Just two months ago, the South Dakota Department of Environment and Natural Resources (DENR) issued a temporary permit to Morris Inc. on March 19 to use 90,000 gallons of Missouri River water for construction purposes as they redo the Department of Game, Fish, and Parks parking lot just above Oahe Dam. When notified of the action, the Corps responded as follows: *"All requests for using water from the South Dakota reservoirs are on hold until finalized guidance is received from Headquarters. An alternate source of water should be utilized for this project."*

To develop a process for Policy Letter No. 2, the Corps began Surplus Water and Reallocation Studies under the authority of Section 6 of the 1944 Flood Control Act and the surplus water provisions in the 1958 Water Supply Act. We do not dispute the Corps has authorities under those Acts, but we strongly dispute the Corps' resulting definition of stored water as being all the water held in the reservoirs. This new definition, should it go unchallenged, creates a monumental change to the law and would defeat states' rights to natural flows that, by tradition and law, are under the jurisdiction of the states.

To better understand natural flows, visualize the reservoirs of stored water sitting on top of a river with natural flow passing underneath; this natural flow represents water under the jurisdiction of the state. States' rights to natural flows of navigable waters within their borders are constitutionally founded, and protected, in the Equal Footing Doctrine. Congress acknowledged this states' right in the first sentence of Section 1 of the 1944 Flood Control Act by stating *"...it is 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 a consequence of the doctrine and the enacted law, the Corps must acknowledge the state's right to natural flows. Its definition of stored water, as proposed in the rulemaking, will do exactly the opposite.

Another concern with the Corps studies is one of equity. The Corps has documented the tremendous benefits the reservoirs supply to people throughout the basin – controlled water supplies, hydropower, and flood control. Now to require just the upstream states to pay the cost through stored water fees with people in the downstream states enjoying these benefits at no cost is not fair or equitable. To impose all reservoir operation and maintenance costs on upstream states alone adds insult to injury.

A more detailed objection to the proposed rulemaking was submitted to the Corps on March 15, 2017, and is enclosed for your use. However, the bottom line is the Corps is attempting an Obama-directed federal takeover of nearly all the Missouri River water in

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May 23, 2018

South Dakota with this proposed rulemaking. It needs to be stopped now before the Corps finalizes the rule in September. In the name of cooperative federalism and protecting state's rights, we ask for your help. Thank you.

Sincerely,

  
Dennis Daugaard  
Governor

  
John Thune  
United States Senator

  
M. Michael Rounds  
United States Senator

  
Kristi Noem  
United States Representative

DD:rg

Enclosure

Cc w/enclosure:

Marty Jackley, South Dakota Attorney General  
Tony Willardson, Executive Director, Western States Water Council



STATE OF SOUTH DAKOTA  
DENNIS DAUGAARD, GOVERNOR

May 2, 2014

The Honorable Tim Johnson  
United States Senate  
Washington, DC 20510

FAX: 202.228.5765

The Honorable John Thune  
United States Senate  
Washington, DC 20510

FAX: 202.228.5429

The Honorable Kristi Noem  
United States House of Representatives  
Washington, DC 20515

FAX: 202.225.5823

Dear Senator Johnson, Senator Thune, and Representative Noem:

I have previously sent you copies of my correspondence to the U.S. Army Corps of Engineers regarding my objections to the Missouri River Reallocation Study (dated October 4, 2012) and the Missouri River Surplus Water Studies (dated October 9, 2012). I regret that none of my objections have deterred the Corps from proceeding. Therefore, I am writing in hopes you might find a mechanism in Congress to end the Corps' march toward usurping South Dakota's water rights.

The Corps is pursuing three courses in their water marketing efforts:

1. the Surplus Water Reports for each of the mainstem reservoirs;
2. the Reallocation Study for the mainstem reservoir system; and
3. the Corps' rulemaking effort with respect to both 1 and 2.

The Corps made a similar effort to charge for storage from the reservoirs in the 1980s. There was significant disagreement between the states and the Corps specific to both potential water contracts and recognition of natural flows, which led to Congressional involvement. The effort went into hibernation for 20 plus years until 2008 when the Corps issued Real Estate Policy Guidance Letter No. 26 which led to the current attempt to market water. Based on that guidance, the Corps announced in early 2010 a new policy that prohibits new water withdrawals from the Missouri River reservoirs for municipal and industrial uses until the users first obtain a storage contract with the Corps. The Corps implements this prohibition by not issuing access easements to reach water stored in the reservoirs.

The Corps claims their authority to proceed in this effort falls under Section 6 of the 1944 Flood Control Act and the surplus water provisions in the 1958 Water Supply Act. There is no dispute that Section 6 of the 1944 Act allows the Corps to sell surplus water; the crux of this dispute hinges on what is meant by surplus water. Albeit a hotly contested topic during the congressional hearings on the 1944 Flood Control Act, no definition of surplus water was ever established by Congress.

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Reallocation of the storage in the mainstem reservoirs requires a full analysis of the entire Missouri River system. Because that is a lengthy process, the Corps recognized the need to provide a short term mechanism to allow potential water users access to water from the reservoirs. Thus, under Section 6 of the 1944 Flood Control Act, the Corps drafted six water surplus reports, one for each of the mainstem reservoirs. Each report identified an amount of water available for temporary use and the cost associated with using water from that particular reservoir. The Corps stated temporary contracts for using stored water would be issued for a period of five years with an option of extending the temporary contract for an additional five years. This would allow the Corps sufficient time to complete a full reallocation study of the mainstem system and identify water in storage that can be reallocated to municipal and industrial use.

Only one of the surplus water reports is finalized and issued; the other five reports remain in draft status. The report issued in July 2012 is for the Garrison Reservoir. The need to expedite this report was the large demand for industrial use water for fracking oil wells in western North Dakota. The Corps took public comments on the remaining five draft reports and sent the final drafts to Assistant Secretary of the Army Darcy for final review in May 2013. The Assistant Secretary was expected to make the final decision on these reports in July 2013, but there has not yet been any action.

In 2012, the Corps started the second effort by initiating a long term reallocation study of municipal and industrial uses. They held scoping meetings to take public comments, which resulted in my initial objections submitted by letter dated October 4, 2012. The Corps also contacted the states, tribes, and federal agencies to form a Cooperating Agency Team to help in the reallocation effort. A normal Cooperating Agency Team process involves drafting the study with team members providing technical assistance to the Corps and a perspective unique to each state, tribe, or agency represented. However, in this effort, the Corps solicited little assistance from the Cooperating Agency Team members. The extent of the Corps' engagement of the Team was as follows. They hosted a kickoff meeting of the Cooperating Agency Team in Yankton in July 2013 to inform the members of the process and time schedule, and held a final Cooperating Agency Team meeting in Kansas City in January 2014 informing the team of the tentative results of the draft study. No assistance from the Cooperating Agency Team was requested by the Corps between the kickoff and final meetings. At the final meeting, the Team members were told they would not be allowed to review a draft of the study prior to it being sent to Corps headquarters for internal review. The Corps told the Team members their first opportunity to review the study will occur after it is released for public comment, tentatively scheduled for July 2014. Obviously, this has not been a cooperative effort by any stretch of the imagination.

The Corps' third effort toward water marketing has involved the rulemaking process. Initially, the rulemaking effort was targeted at setting the cost schedules for using stored water as per the surplus water reports. The draft studies listed projected pricing from a low of \$17 per acre-foot of water from the Oahe Reservoir to a high of \$175 per acre-foot of water from Gavins Point Reservoir. It should be noted that no downstream users of Missouri River water would pay for any benefits they receive. In May 2012, Assistant Secretary of the Army Darcy, in a memorandum regarding the Lake Sakakawea Surplus Water Report, indicated the Corps rulemaking would immediately begin by setting the cost and policies for use of water stored in

Senator Johnson, Senator Thune, and Representative Noem  
May 2, 2014  
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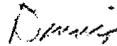
the Missouri River reservoirs. However, that did not happen. At the kickoff meeting of the Cooperating Agency Team in 2013, the Corps' rulemaking effort was discussed and the Corps indicated they may be expanding the scope of the effort, but no specifics were given. While the Corps has not publicly announced they have started the rulemaking process, the Western States Water Council in an August 6, 2013, letter calls on the Corps to recognize and defer to the states' legal right to allocate, develop, use, control, and distribute their surface waters to include natural flows of the Missouri River.

The Corps' march toward control over all Missouri River water stored in the reservoirs, if left unchecked, will allow the Corps:

- to control management of all water stored in the reservoirs for current and future municipal and industrial use;
- to usurp the authority of states to manage their own water supplies for the benefit of their citizens - a state's right, long recognized by Congress and the federal government; and
- to usurp the state's right to jurisdiction, access, and use of natural flows in the Missouri River system.

Existing uses from the Missouri River in South Dakota are less than the natural flows, so the Corps has no jurisdiction or authority to charge for water used in South Dakota. The Corps is choosing to ignore both the state's right to natural flows of the Missouri River and Section 1 of the 1944 Flood Control Act, also known as the O'Mahoney-Milliken Amendment. Both a plain meaning and a historical perspective leave little doubt that the purpose of the O'Mahoney-Milliken amendment was to guarantee to the states the right to allocate waters within their boundaries without regard to the impact of such allocation on navigation. Simply put, the three efforts listed above are a hostile takeover of the state's water and authority to allocate Missouri River water. The Corps has said the outcome of the Missouri River studies will be their model for use nationwide. I am asking for your help to stop the Corps in all three of their efforts, not only here, but nationally. Thank you.

Sincerely,



Dennis Daugaard

DD:nn

Senator ROUNDS. Once again, I want to thank all of you for coming and participating in this, and I hope that this helps to bring some focus on what I think is a true injustice that has been started and that we would like to see eliminated as quickly as possible so that normal people can get access to drinking water once again, which is a lot of what this is all about.

So once again I would like to thank our witnesses for taking the time to be with us today, and I would also like to thank my colleague who attended this hearing, and also for your thoughts and your questions.

The record will be open for 2 weeks, which brings us up to Wednesday, June 27th. This hearing is adjourned. Thank you.

[Whereupon, at 3:59 a.m. the committee was adjourned.]

[Additional material submitted for the record follows.]



## WESTERN STATES WATER COUNCIL

5296 Commerce Drive, Suite 202 1 Murray, Utah 84107 1 (801) 685-2555 1 FAX (801) 685-2559

Web Page: [www.westernstateswater.org](http://www.westernstateswater.org)

August 6, 2013

Via Email: [joellen.darcy@us.army.mil](mailto:joellen.darcy@us.army.mil)

The Honorable Jo-Ellen Darcy  
 Assistant Secretary of the Army (Civil Works)  
 108 Army Pentagon  
 Washington, DC 20310-0108

Dear Assistant Secretary Darcy:

On behalf of the Western States Water Council, representing the governors of 18 western states on water policy issues, I am writing to provide the Council's perspective on the U.S. Army Corps of Engineers' efforts involving surplus water and storage at Corps reservoirs. In particular, it is our understanding that the Corps is pursuing rulemaking intended to clarify definitions in its water supply policies and to specify the policies and methodology it will use to determine prices for surplus water contracts pursuant to Section 6 of the Flood Control Act (FCA) of 1944. We also understand that the Corps is conducting a system-wide analysis of storage water reallocation in the Missouri River Mainstem Reservoir System.

As the Corps pursues these efforts, we respectfully request that you consider the following comments and perspectives, as well as the enclosed position regarding the states' right to access the natural flows that would exist absent Corps reservoirs and dams.

**A. State Primacy**

Water belongs to the states which have exclusive authority over the allocation and administration of rights to the use of surface water within their borders. State granted water use permits, once put to beneficial use, also become property rights with constitutional protections, including due process and compensation if taken through government action.

The basis of the states' primary and exclusive authority over their water resources is rooted in the Equal Footing Doctrine in Article IV of the U.S. Constitution, under which states take title to the navigable waters within their borders upon admission to the Union. As the U.S. Supreme Court has noted, Congress has also demonstrated a "consistent thread of purposeful and continued deference to state water law"<sup>1</sup> through such laws as the Mining Acts of 1866 and 1870, the Desert Lands Act of 1877, the Federal Water Power Act of 1920, and others. One notable example of this deference is found in Section 8 of the Reclamation Act, which states:

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<sup>1</sup> *California v. U.S.*, 438 U.S. 645, 653-664 (1978).

[N]othing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws....<sup>2</sup>

Congress was well aware of this deference when it enacted the laws that govern the use of surplus water and storage at Corps' reservoirs, namely the FCA and the Water Supply Act (WSA) of 1958. For example, it specified in the first sentence of the FCA in Section 1 that it is "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...."<sup>3</sup> Similarly, Congress specified in Section 301(a) of the WSA that it is the policy of Congress to:

[R]ecognize the primary responsibilities of the States and local interests in developing water supplies...and that the Federal Government should participate and cooperate with States and local interests in developing such water supplies in connection with the construction, maintenance, and operation of Federal navigation, flood control, irrigation, or multiple purpose projects.<sup>4</sup>

Section 301(c) of the WSA further specifies that the law's water supply section "shall not be construed to modify the provisions" of Section 1 of the FCA or the provisions of Section 8 of the Reclamation Act of 1902.<sup>5</sup>

In light of the above, the Corps' surplus water rulemaking and storage reallocation study must recognize and defer to the states' legal right to allocate, develop, use, control, and distribute their surface waters, including but not limited to state storage and use requirements.

## B. Stored Water

The Corps' efforts must acknowledge the difference between a reservoir's storage capacity and stored water. Stored water does not encompass all of the water in a reservoir. To the contrary, it represents the difference between water flowing into a reservoir and the water flowing out of the reservoir. Stated another way, if more water flows into the reservoir than leaves the reservoir, this is captured as stored water. If less water flows into the reservoir than leaves the reservoir, this water supply represents the release of stored water. In either event, the natural flows that would exist absent the Corps' dams and reservoirs should not be considered stored water. Nor should the natural flows be subject to interference or require a contract or fee by the Corps to be appropriated by the states.

<sup>2</sup> 43 U.S.C. § 383.

<sup>3</sup> 33 U.S.C. § 701-1 (emphasis added).

<sup>4</sup> 43 U.S.C. § 390b.

<sup>5</sup> *Id.*

### C. The Flood Control Act of 1944

We are especially concerned about the Corps' decision to condition access to the natural flows that run through six mainstem reservoirs along the Missouri River by requiring a determination that surplus water is available for withdrawal and requiring that applicants sign a water supply agreement to pay the Corps for the proportionate cost of storing the water. As discussed below, these additional and unnecessary requirements are based upon a misinterpretation of the Act and should not serve as the basis of any rulemaking or study.

Section 6 of the FCA states that the Corps "is authorized to make contracts...at such prices and on such terms as [it] may deem reasonable, for domestic and industrial uses for surplus water that may be available at any reservoir" under the Corps' control.<sup>6</sup> The Corps has interpreted "surplus water" to mean any water in a Corps reservoir that is not required for federally authorized purposes "because the authorized use for the water never developed or the need was reduced by changes that occurred since authorization or construction."<sup>7</sup> Corps officials in the Missouri River Basin have further indicated that once water reaches a reservoir, all water within the boundaries of that reservoir is subject to the Corps' authority and can be evaluated to determine whether it is "surplus" under the above definition, including the natural flows belonging to the states.

This interpretation ignores the distinction between storage capacity and stored water by improperly viewing the Missouri River as a series of reservoirs connected by free-flowing rivers. The more correct view is that there are reservoirs sitting on top of portions of the River. The Corps can evaluate the reservoir pool to determine whether there is water surplus for authorized needs and uses, but the natural flowing-river volumes that run beneath the reservoir system should not be considered stored water and may be permitted by the respective states without Corps interference or contract and fee requirements. Reasoning otherwise would be contrary to the protection of state "interests and rights in water utilization and control" provided under Section 1 of the FCA, as well as requirements under Section 6 that storage contracts for surplus water must not "adversely affect then existing lawful uses of such water."<sup>8</sup> The states' use of natural flows was an existing lawful use prior to the Act's enactment and is therefore protected.

In light of the above, the Corps must recognize the states' rights by ensuring that its rulemaking and study do not consider natural flows to be surplus water or stored water. As stated in the enclosed position, any definition requiring a storage contract to access natural flows within a reservoir boundary would improperly expand the Corps' authority and violate the states' rights to develop, use, control, and distribute surface water. It would also conflict with state water laws relating to storage for water supply and the practices of other federal agencies that recognize western water laws, such as the Bureau of Reclamation.

<sup>6</sup> 33 U.S.C. § 708 (emphasis added).

<sup>7</sup> Engineer Regulation 1105-2-100, Planning Guidance Notebook at E-214 (Apr. 22, 2000).

<sup>8</sup> 33 U.S.C. §§ 701-1, 708 (emphasis added).

#### D. Water Supply Act of 1958

We understand that some Corps representatives have cited Section 301(b) of the WSA as further justification for denying access to natural flows. Section 301(b) authorizes the Corps to include storage at any planned or existing Corps reservoir for municipal and industrial water supply, provided that “State or local interests shall agree to pay for the cost of such provisions...”<sup>9</sup>

We recognize the Corps’ authority under the WSA to require a contractual commitment to repay a portion of the cost of providing storage. However, as noted above, the amount of water stored in a reservoir does not include all of the water flowing through its boundaries. Requiring a fee to access natural flows that would otherwise be available absent the Corps’ facilities conflicts with the recognition of state primacy over water utilization and control found in Sections 301(a) and 301(c) of the WSA. Such a requirement also runs counter to Section 301(b)’s stated purpose of recouping expenses the Corps incurs in providing storage.

#### E. Flexibility

Any rulemaking to address surplus water contracts should be flexible enough to accommodate the various state laws, prior appropriation and riparian doctrines, and diverse physical conditions found throughout the country. In almost all cases, the most effective way to provide this flexibility is on a project-specific basis rather than with a “one-size-fits-all” approach. The Corps must also fully understand and follow its specific congressional authorizations and their supporting documentation, most of which recognize the unique elements of each basin and the differences in state law.

Additionally, the rulemaking must treat prior appropriation states differently than riparian states to account for the differences in their water laws and policies. For example, in riparian states, reasonable use of the water belongs to riparian owners. This means that the Corps, as the riparian owner, would have a user interest in the water captured in its reservoirs. However, prior appropriation states do not vest user rights based on land ownership. This means that the Corps has no user interest in the rivers flowing through its reservoirs unless it has received a grant of those rights from the state. Thus, while Congress has authorized the Corps to operate its dams for specified purposes in prior appropriation states, such authority does not mean that the Corps has Congressional authority to capture all water supply in a reservoir without an ownership interest or rights to consumptive use.

Furthermore, any rulemaking that fails to treat prior appropriation and riparian states differently could also conflict with Section 1(b) of the FCA, which protects beneficial uses in states west of the ninety-eighth meridian by stating:

[T]he use for navigation... 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

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<sup>9</sup> 43 U.S.C. § 390b.

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....<sup>10</sup>

Other issues that require flexibility include but are not limited to:

- Many western states require a permit to impound and divert water, which may include the diversion of water from surplus storage.
- In some states, allocating return flows to all owners or users in a reservoir may result in water that is permitted to an existing water right being allocated in a way that violates state laws and state ownership of the water.
- The use or reuse of return flows may require a permit in some states, as well as a determination that the use of the water will not impair existing state-issued water rights.

#### **F. Outreach with States**

We respectfully urge your office and the Corps to engage the states as early as possible in its rulemaking and the development of the study. Given the implications these efforts could have on state water rights, state input will be most meaningful during the preliminary stages of development. Ideally, this engagement should happen before the proposed rule and study are published for public comment and too much momentum has built towards federal policy decisions that may not account for state rights and needs.

#### **G. Conclusion**

In sum, the Corps' surplus water rulemaking and storage water reallocation study should: (1) be developed with robust and meaningful state participation; (2) recognize and defer to the states' primary and exclusive authority over the allocation of surface water; (3) properly distinguish between stored water and storage capacity; and (4) ensure that natural flows are not considered to be surplus or stored water.

Moreover, the surplus water rulemaking effort should be flexible enough to accommodate the states' differing legal doctrines and physical conditions, and should treat prior appropriation and riparian states differently.

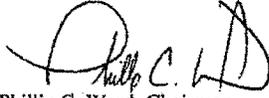
We would greatly appreciate the opportunity to have a dialog about these efforts, and invite you or a representative to join us at our upcoming fall meetings on October 2-4, in Deadwood, South Dakota.

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<sup>10</sup> 33 U.S.C. § 701-1(b).

Thank you for considering our comments and concerns, as well as our invitation. We look forward to continuing our collaborative relationship with the Corps to address these and other water management issues in the West.

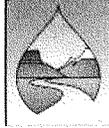
Respectfully,

A handwritten signature in black ink, appearing to read "Phillip C. Ward". The signature is stylized and written over a light blue horizontal line.

Phillip C. Ward, Chairman  
Western States Water Council

Encl.

- Cc: Steven Stockton, Director of Civil Works, U.S. Army Corps of Engineers  
David Ponganis, Regional Director of Programs, Northwestern Division, U.S. Army Corps of Engineers  
John D'Antonio, WestFAST Representative, U.S. Army Corps of Engineers  
The Honorable Barbara Boxer, Chairwoman, Senate Environment and Public Works Committee  
The Honorable David Vitter, Ranking Member, Senate Environment and Public Works Committee  
The Honorable John Hoeven, Senator, North Dakota  
The Honorable Heidi Heitkamp, Senator, North Dakota  
The Honorable Tim Johnson, Senator, South Dakota  
The Honorable John Thune, Senator, South Dakota  
The Honorable Bill Shuster, Chairman, House Transportation and Infrastructure Committee  
The Honorable Nick Rahall, Ranking Member, House Transportation and Infrastructure Committee  
The Honorable Markwayne Mullin, Representative, Oklahoma  
The Honorable Kevin Cramer, Representative, North Dakota  
The Honorable Kristi Noem, Representative, South Dakota



## WESTERN STATES WATER COUNCIL

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May 12, 2017

Theodore Brown  
 Chief, Policy and Planning Division  
 COE/DOD  
 441 G Street, NW.  
 Washington, DC 20314

theodore.a.brown.civ@mail.mil

RE: Proposed Rule on Use of U.S. Army Corps of Engineers Reservoir Projects for Domestic, Municipal & Industrial Water Supply

Dear Chief Brown:

On behalf of the Western States Water Council, I am writing to comment on the Corps' proposed rule on the use of reservoir projects for domestic, municipal, and industrial water supply, published in the Federal Register for public comment on December 16, 2016.

As previously expressed in our letter to Assistant Secretary Jo-Ellen Darcy on August 6, 2013, our member states have serious concerns over the lack of substantive state participation in the development of the rule. State input for such a water supply rule is critical, particularly where the Corps policies will result in a disproportionate impact on western water resources, where the laws differ significantly from the laws governing riparian water users along rivers in the East. The Western States have primary, often exclusive authority over the protection, development, and management of waters within their boundaries, including natural surface waters flowing through Corps reservoirs and dams. We believe that the Corps' assertions of broad authority over surface waters and the potential interference with the lawful exercise of state water rights are contrary to over 100 years of deference afforded state water laws by the Congress and the Supreme Court of the United States.<sup>1</sup>

The proposed rule fails to distinguish between "surplus waters," defined by the Corps in relation to storage and authorized purposes, and the "natural flows," defined as waters that would be available for use in the absence of federal dams and reservoirs. Natural flows are under exclusive jurisdiction of the states. For those natural flows that are located within a federal reservoir (water not stored), the Corps should grant an easement for access to the natural flow as long as the easement does not interfere with the Corps authorities. The States' authority allows the states to determine whether sufficient natural flows exist when granting state water rights.

The Corps' definition and quantification of "surplus waters" must explicitly exclude the "natural flows." The proposed rule indicates that it is not intended to upset the balance between federal

<sup>1</sup> See, e.g., the 1866 Mining Act (43 USC §661); the 1877 Desert Land Act (43 USC §321); the 1920 Federal Power Act (16 USC §§802, 821); the Clean Water Act (33 USC §§1251(b) and (g)); the 1902 Reclamation Act (43 USC §383); the 1944 Flood Control Act (33 USC §701-1); the 1958 Water Supply Act (43 USC §390b); *Martin v. Lessee of Wadell*, 41 U.S. 367, 410 (1842); *Pollard v. Hagan*, 44 U.S. 212 (1845); *Kansas v. Colorado*, 206 U.S. 46 (1907); *California Oregon Power v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935); *California v. U.S.*, 438 U.S. 645, 653-664 (1978); *PPL Montana v. Montana*, 565 U.S. 576 (2012).

purposes and state prerogatives to allocate water. However, without making a clear distinction between Corps' "surplus waters" and state "natural flows," the rule will do precisely that. The Corps must recognize the legal right of the states to develop, use, manage, control, distribute, and allocate the states' surface waters. Any Corps policy to require storage contracts subject to surplus determinations, time limitations, right-of-way requirements, and fees to access these "natural flows" within a reservoir boundary would be a violation of the states' rights.

The proposed rule also fails to recognize critical differences between the climate, hydrology, and water laws of the Eastern and Western States. Unlike the wetter climate of the East, precipitation is often scarce in the West, and numerous reservoirs capture and moderate the "natural flows." Corps' reservoirs primarily provide non-consumptive flood control, hydropower and navigation benefits, but may be a significant source of municipal and industrial water. Further, the scale of the Corps' projects in the West is often much larger than in the East. Reservoirs capture large volumes, which may comprise a greater percentage of the average annual flow, and can cover hundreds of square miles. Withdrawals of "natural flows" for consumptive uses by the state or state water rights holders may often be *de minimus* compared to storage and releases for authorized federal purposes.

Water law differences are also substantial. For example, Eastern riparian property owners may withdraw waters from adjacent sources without a state permit. In the West, under state-granted water rights, water must be appropriated, withdrawn, and often transferred long distances from the point of diversion to the point of use. Water users under a prior appropriations legal framework also often have vested private property rights in water, granted and administered by the states. These may be entitled to Constitutional protections and may not be taken for public purposes without just compensation. Securely established water rights are vital to the Western States' economies and their ability to grow. By ignoring regional differences, the proposed rule threatens to undermine the legal structure long-established in the West to allocate limited water resources.

The proposed rule notes that the Corps intends to initiate a positive dialogue "with all interested parties, resulting in a final rule that will more effectively accomplish Congressional intent regarding the utilization of Corps reservoirs for water supply." We request that the Corps enter into an open and authentic dialogue with the states designed to achieve a mutually acceptable policy that reflects the Constitutional division of powers, state primacy over water resources allocation, and the realities of western water law, with a flexible but consistent approach that accounts for the significant physical, hydrological, and legal differences that exist between the states.

Thank you for considering our comments and concerns, as well as our request to engage more fully with the states. We look forward to continuing our collaborative relationship with the Corps to address these and other water management issues in the West.

Sincerely,



Jerry Rigby, Chairman  
Western States Water Council



WESTERN STATES WATER COUNCIL

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August 6, 2013

Via Email: [joellen.darcy@us.army.mil](mailto:joellen.darcy@us.army.mil)

The Honorable Jo-Ellen Darcy  
 Assistant Secretary of the Army (Civil Works)  
 108 Army Pentagon  
 Washington, DC 20310-0108

Dear Assistant Secretary Darcy:

On behalf of the Western States Water Council, representing the governors of 18 western states on water policy issues, I am writing to provide the Council's perspective on the U.S. Army Corps of Engineers' efforts involving surplus water and storage at Corps reservoirs. In particular, it is our understanding that the Corps is pursuing rulemaking intended to clarify definitions in its water supply policies and to specify the policies and methodology it will use to determine prices for surplus water contracts pursuant to Section 6 of the Flood Control Act (FCA) of 1944. We also understand that the Corps is conducting a system-wide analysis of storage water reallocation in the Missouri River Mainstem Reservoir System.

As the Corps pursues these efforts, we respectfully request that you consider the following comments and perspectives, as well as the enclosed position regarding the states' right to access the natural flows that would exist absent Corps reservoirs and dams.

**A. State Primacy**

Water belongs to the states which have exclusive authority over the allocation and administration of rights to the use of surface water within their borders. State granted water use permits, once put to beneficial use, also become property rights with constitutional protections, including due process and compensation if taken through government action.

The basis of the states' primary and exclusive authority over their water resources is rooted in the Equal Footing Doctrine in Article IV of the U.S. Constitution, under which states take title to the navigable waters within their borders upon admission to the Union. As the U.S. Supreme Court has noted, Congress has also demonstrated a "consistent thread of purposeful and continued deference to state water law"<sup>1</sup> through such laws as the Mining Acts of 1866 and 1870, the Desert Lands Act of 1877, the Federal Water Power Act of 1920, and others. One notable example of this deference is found in Section 8 of the Reclamation Act, which states:

<sup>1</sup> *California v. U.S.*, 438 U.S. 645, 653-664 (1978).

[N]othing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws....<sup>2</sup>

Congress was well aware of this deference when it enacted the laws that govern the use of surplus water and storage at Corps' reservoirs, namely the FCA and the Water Supply Act (WSA) of 1958. For example, it specified in the first sentence of the FCA in Section 1 that it is "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...."<sup>3</sup> Similarly, Congress specified in Section 301(a) of the WSA that it is the policy of Congress to:

[R]ecognize the primary responsibilities of the States and local interests in developing water supplies...and that the Federal Government should participate and cooperate with States and local interests in developing such water supplies in connection with the construction, maintenance, and operation of Federal navigation, flood control, irrigation, or multiple purpose projects.<sup>4</sup>

Section 301(c) of the WSA further specifies that the law's water supply section "shall not be construed to modify the provisions" of Section 1 of the FCA or the provisions of Section 8 of the Reclamation Act of 1902.<sup>5</sup>

In light of the above, the Corps' surplus water rulemaking and storage reallocation study must recognize and defer to the states' legal right to allocate, develop, use, control, and distribute their surface waters, including but not limited to state storage and use requirements.

## **B. Stored Water**

The Corps' efforts must acknowledge the difference between a reservoir's storage capacity and stored water. Stored water does not encompass all of the water in a reservoir. To the contrary, it represents the difference between water flowing into a reservoir and the water flowing out of the reservoir. Stated another way, if more water flows into the reservoir than leaves the reservoir, this is captured as stored water. If less water flows into the reservoir than leaves the reservoir, this water supply represents the release of stored water. In either event, the natural flows that would exist absent the Corps' dams and reservoirs should not be considered stored water. Nor should the natural flows be subject to interference or require a contract or fee by the Corps to be appropriated by the states.

<sup>2</sup> 43 U.S.C. § 383.

<sup>3</sup> 33 U.S.C. § 701-1 (emphasis added).

<sup>4</sup> 43 U.S.C. § 390b.

<sup>5</sup> *Id.*

### C. The Flood Control Act of 1944

We are especially concerned about the Corps' decision to condition access to the natural flows that run through six mainstem reservoirs along the Missouri River by requiring a determination that surplus water is available for withdrawal and requiring that applicants sign a water supply agreement to pay the Corps for the proportionate cost of storing the water. As discussed below, these additional and unnecessary requirements are based upon a misinterpretation of the Act and should not serve as the basis of any rulemaking or study.

Section 6 of the FCA states that the Corps "is authorized to make contracts...at such prices and on such terms as [it] may deem reasonable, for domestic and industrial uses for surplus water that may be available at any reservoir" under the Corps' control.<sup>6</sup> The Corps has interpreted "surplus water" to mean any water in a Corps reservoir that is not required for federally authorized purposes "because the authorized use for the water never developed or the need was reduced by changes that occurred since authorization or construction."<sup>7</sup> Corps officials in the Missouri River Basin have further indicated that once water reaches a reservoir, all water within the boundaries of that reservoir is subject to the Corps' authority and can be evaluated to determine whether it is "surplus" under the above definition, including the natural flows belonging to the states.

This interpretation ignores the distinction between storage capacity and stored water by improperly viewing the Missouri River as a series of reservoirs connected by free-flowing rivers. The more correct view is that there are reservoirs sitting on top of portions of the River. The Corps can evaluate the reservoir pool to determine whether there is water surplus for authorized needs and uses, but the natural flowing-river volumes that run beneath the reservoir system should not be considered stored water and may be permitted by the respective states without Corps interference or contract and fee requirements. Reasoning otherwise would be contrary to the protection of state "interests and rights in water utilization and control" provided under Section 1 of the FCA, as well as requirements under Section 6 that storage contracts for surplus water must not "adversely affect then existing lawful uses of such water."<sup>8</sup> The states' use of natural flows was an existing lawful use prior to the Act's enactment and is therefore protected.

In light of the above, the Corps must recognize the states' rights by ensuring that its rulemaking and study do not consider natural flows to be surplus water or stored water. As stated in the enclosed position, any definition requiring a storage contract to access natural flows within a reservoir boundary would improperly expand the Corps' authority and violate the states' rights to develop, use, control, and distribute surface water. It would also conflict with state water laws relating to storage for water supply and the practices of other federal agencies that recognize western water laws, such as the Bureau of Reclamation.

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<sup>6</sup> 33 U.S.C. § 708 (emphasis added).

<sup>7</sup> Engineer Regulation 1105-2-100, Planning Guidance Notebook at E-214 (Apr. 22, 2000).

<sup>8</sup> 33 U.S.C. §§ 701-1, 708 (emphasis added).

#### D. Water Supply Act of 1958

We understand that some Corps representatives have cited Section 301(b) of the WSA as further justification for denying access to natural flows. Section 301(b) authorizes the Corps to include storage at any planned or existing Corps reservoir for municipal and industrial water supply, provided that “State or local interests shall agree to pay for the cost of such provisions...”<sup>9</sup>

We recognize the Corps’ authority under the WSA to require a contractual commitment to repay a portion of the cost of providing storage. However, as noted above, the amount of water stored in a reservoir does not include all of the water flowing through its boundaries. Requiring a fee to access natural flows that would otherwise be available absent the Corps’ facilities conflicts with the recognition of state primacy over water utilization and control found in Sections 301(a) and 301(c) of the WSA. Such a requirement also runs counter to Section 301(b)’s stated purpose of recouping expenses the Corps incurs in providing storage.

#### E. Flexibility

Any rulemaking to address surplus water contracts should be flexible enough to accommodate the various state laws, prior appropriation and riparian doctrines, and diverse physical conditions found throughout the country. In almost all cases, the most effective way to provide this flexibility is on a project-specific basis rather than with a “one-size-fits-all” approach. The Corps must also fully understand and follow its specific congressional authorizations and their supporting documentation, most of which recognize the unique elements of each basin and the differences in state law.

Additionally, the rulemaking must treat prior appropriation states differently than riparian states to account for the differences in their water laws and policies. For example, in riparian states, reasonable use of the water belongs to riparian owners. This means that the Corps, as the riparian owner, would have a user interest in the water captured in its reservoirs. However, prior appropriation states do not vest user rights based on land ownership. This means that the Corps has no user interest in the rivers flowing through its reservoirs unless it has received a grant of those rights from the state. Thus, while Congress has authorized the Corps to operate its dams for specified purposes in prior appropriation states, such authority does not mean that the Corps has Congressional authority to capture all water supply in a reservoir without an ownership interest or rights to consumptive use.

Furthermore, any rulemaking that fails to treat prior appropriation and riparian states differently could also conflict with Section 1(b) of the FCA, which protects beneficial uses in states west of the ninety-eighth meridian by stating:

[T]he use for navigation...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

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<sup>9</sup> 43 U.S.C. § 390b.

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....<sup>10</sup>

Other issues that require flexibility include but are not limited to:

- Many western states require a permit to impound and divert water, which may include the diversion of water from surplus storage.
- In some states, allocating return flows to all owners or users in a reservoir may result in water that is permitted to an existing water right being allocated in a way that violates state laws and state ownership of the water.
- The use or reuse of return flows may require a permit in some states, as well as a determination that the use of the water will not impair existing state-issued water rights.

#### **F. Outreach with States**

We respectfully urge your office and the Corps to engage the states as early as possible in its rulemaking and the development of the study. Given the implications these efforts could have on state water rights, state input will be most meaningful during the preliminary stages of development. Ideally, this engagement should happen before the proposed rule and study are published for public comment and too much momentum has built towards federal policy decisions that may not account for state rights and needs.

#### **G. Conclusion**

In sum, the Corps' surplus water rulemaking and storage water reallocation study should: (1) be developed with robust and meaningful state participation; (2) recognize and defer to the states' primary and exclusive authority over the allocation of surface water; (3) properly distinguish between stored water and storage capacity; and (4) ensure that natural flows are not considered to be surplus or stored water.

Moreover, the surplus water rulemaking effort should be flexible enough to accommodate the states' differing legal doctrines and physical conditions, and should treat prior appropriation and riparian states differently.

We would greatly appreciate the opportunity to have a dialog about these efforts, and invite you or a representative to join us at our upcoming fall meetings on October 2-4, in Deadwood, South Dakota.

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<sup>10</sup> 33 U.S.C. § 701-1(b).

Thank you for considering our comments and concerns, as well as our invitation. We look forward to continuing our collaborative relationship with the Corps to address these and other water management issues in the West.

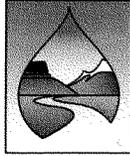
Respectfully,



Phillip C. Ward, Chairman  
Western States Water Council

Encl.

- Cc: Steven Stockton, Director of Civil Works, U.S. Army Corps of Engineers  
David Ponganis, Regional Director of Programs, Northwestern Division, U.S. Army Corps of Engineers  
John D'Antonio, WestFAST Representative, U.S. Army Corps of Engineers  
The Honorable Barbara Boxer, Chairwoman, Senate Environment and Public Works Committee  
The Honorable David Vitter, Ranking Member, Senate Environment and Public Works Committee  
The Honorable John Hoeven, Senator, North Dakota  
The Honorable Heidi Heitkamp, Senator, North Dakota  
The Honorable Tim Johnson, Senator, South Dakota  
The Honorable John Thune, Senator, South Dakota  
The Honorable Bill Shuster, Chairman, House Transportation and Infrastructure Committee  
The Honorable Nick Rahall, Ranking Member, House Transportation and Infrastructure Committee  
The Honorable Markwayne Mullin, Representative, Oklahoma  
The Honorable Kevin Cramer, Representative, North Dakota  
The Honorable Kristi Noem, Representative, South Dakota



Position No. 388  
Readopted

*(formerly Position No. 348, October 12, 2012)*

**POSITION  
of the  
WESTERN STATES WATER COUNCIL  
regarding  
STATES' WATER RIGHTS AND NATURAL FLOWS  
Manhattan, Kansas  
October 9, 2015**

**WHEREAS**, the Western States Water Council strongly supports preservation of the States' inherent right to develop, use, control, and distribute water; and

**WHEREAS**, States have exclusive authority over the allocation and administration of rights to the use of surface water located within their borders and are primarily responsible for protecting, managing and otherwise controlling the resource; and

**WHEREAS**, States are in the best position to protect and allow for the orderly and rational allocation and administration of the resource through state laws and regulations that are specific to their individual circumstances; and

**WHEREAS**, the Flood Control Act of 1944 specifically declared the policy of Congress to recognize the interests and rights of the Missouri River Basin States in determining the development of the watersheds within their borders and likewise their interests and rights in water use and control, and to preserve and protect to the fullest extent established and potential uses of the rivers' natural flows, those flows being the natural flows that would pass through the states in the absence of the U.S. Army Corps of Engineers dams; and

**WHEREAS**, the federal government has long recognized the right to use water as determined under the laws of the various states; and

**WHEREAS**, the various states have the authority and duty to manage permitting of stored water to supplement natural flows; and

**WHEREAS**, federal agencies in the western states, such as the Bureau of Reclamation, generally recognize western water laws and natural flows through reservoir operations, with releases from storage that supplement natural flows, and water service contracts that supplement natural flow; and

**WHEREAS**, representatives of the U.S. Army Corps of Engineers have indicated that all waters entering its Missouri River mainstem reservoirs are stored waters to be allocated and controlled by the U.S. Army Corps of Engineers without recognition of the States' rights to natural flows being separate from the captured floodwaters stored within those reservoirs.

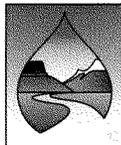
Position No. 388  
Readopted  
*(formerly Position No. 348, October 12, 2012)*

**NOW, THEREFORE, BE IT RESOLVED**, that the Western States Water Council urge the Army Corps of Engineers to recognize the legal right of the States to the development, use, control, distribution and allocation of the States' surface waters.

**BE IT FURTHER RESOLVED**, that any policy of the U.S. Army Corps of Engineers to require storage contracts to access natural flows within a reservoir boundary would be a violation of the States' rights to develop, use, control, and distribute surface water.

**BE IT FURTHER RESOLVED**, that the Western States Water Council opposes any and all efforts that would diminish the primary and exclusive authority of States over the allocation of surface water.

*\*Nebraska abstained from voting on the position in October 2012.*



**WESTERN STATES WATER COUNCIL**

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Web Page: [www.westernstateswater.org](http://www.westernstateswater.org)

June 12, 2018

The Honorable Mike Rounds, Chairman  
Subcommittee on Superfund, Waste Management, and Regulatory Oversight  
Senate Environment and Public Works Committee  
410 Dirksen Senate Office Building  
Washington, D.C. 20510

Re: Oversight Hearing on the Army Corps' Regulation of Surplus Water and the Role of States' Rights

Dear Chairman Rounds:

On behalf of the Western States Water Council (WSWC), a government entity created by the governors of western states to advise them on water policy issues, we would like to submit for the record the attached resolution calling on the U.S. Army Corps of Engineers (Corps) to recognize the legal right of the States to the development, use, control, distribution and allocation of the States' surface waters.

Further, the resolution declares that any policy to require storage contracts to access natural flows within a reservoir boundary would be a violation of the States' rights. The WSWC opposes any efforts that would diminish the primary and exclusive authority of States over the allocation of surface water.

Also attached for the record is a comment letter detailing concerns dated May 12, 2017 from the WSWC to the Corps' Policy and Planning Division Chief, and an accompanying letter dated August 6, 2013 to the Assistant Secretary of the Army (Civil Works).

We appreciate your leadership on this important issue.

Sincerely,

Handwritten signature of Jerry Rigby in cursive.

Jerry Rigby  
Chairman  
Western States Water Council

Handwritten signature of Tony Willardson in cursive.

Tony Willardson  
Executive Director  
Western States Water Council



**South Dakota Department of Game, Fish, and Parks**  
**South Dakota Department of Environment and Natural Resources**  
Joe Foss Building  
523 East Capitol Avenue  
Pierre, SD 57501

April 18, 2018

Brigadier General Scott A. Spellmon  
Commander, Northwestern Division  
U.S. Army Corps of Engineers  
P.O. Box 2870  
Portland, OR 97208-2870

Dear General Spellmon:

Thank you for coming to Pierre today and allowing us to present our comments on the 2017-2018 Draft Annual Operating Plan (Draft AOP). We look forward to working with you on the management of the Missouri River.

Current projections for 2018 indicate an above normal runoff year. System storage is currently at approximately 59.1 million acre feet, and the U.S. Army Corps of Engineers (USACE) projects the annual runoff above Sioux City for 2018 to be 30.5 million acre feet. This is 120% of normal and 4.3 million acre feet above the long-term average.

We appreciate the effort you have made in improving communication with other federal, state, and local entities throughout the fall and winter months to ensure awareness of basin conditions. With the high mountain snowpack this year and the occurrence of late winter storms, we ask that the USACE be diligent in its efforts to keep Missouri River basin states and stakeholders informed of the status of water storage and yield in the reservoir system this spring and summer.

Following the flood of 2011, an independent review panel recommended improvements to better determine pre-runoff conditions pertaining to plains snowpack assessment and soil moisture monitoring. Section 4003 of the Water Resources Reform and Development Act of 2014 (WRRDA 2014) authorized the development of a snowpack and drought monitoring program in the Upper Missouri Basin. Section 1179 of the Water Resources Development Act of 2016 designated the USACE as the lead agency in the effort to coordinate and implement the requirements of Section

4003 of WRRDA 2014. We strongly encourage the USACE to proceed with the development and implementation of this program and request that funds be included in USACE Federal Fiscal Year 2020 budget requests to provide the necessary funding for the program.

The flood of 2011 changed the physical characteristics of the river channel in the Pierre/Ft. Pierre area. As reported at the August 22, 2017, hearing held by the US Senate Subcommittee on Superfund, Waste Management, and Regulatory Oversight and Chaired by Senator Rounds in Pierre, the 2017 summer higher releases from Oahe had the noticeable effect of impacting adjoining property along the river downstream from the dam. As we had requested previously, we recommend a post-flood channel morphometry study in the Pierre/Ft. Pierre area be conducted to allow assessment of possible flooding issues at various summer and winter release levels out of Oahe Dam. The US Army Corps of Engineers (USACE) should also update the inundation maps for the river corridor due to changes in channel capacity. As for development of the plains snow pack monitoring system, we request the necessary funds for the channel morphometry budget be included in the USACE 2020 budget request.

While current projections for water yield in 2018 are for above-average runoff, drought conditions currently exist in the upper Great Plains. If water yield projections decrease to below normal later in 2018 because of drought, we request that the USACE implement discretionary water conservation measures. Specifically, we request that the USACE not support navigation targets at locations when there is no commercial barge traffic on the reach affected.

When the four mainstem reservoirs in South Dakota were constructed, our citizens and Tribes paid a heavy price. As the reservoirs filled, more than 500,000 acres of our most fertile river bottomlands were permanently flooded. Many citizens and tribal members were forced from their lands, their homes, and their communities. Therefore, we appreciate the commitment the USACE has made toward working with Tribes in South Dakota to protect historic and cultural resources under the 2004 Programmatic Agreement for Operation and Management of the Missouri River Mainstem System.

We recognize the efforts the USACE and Western Area Power Administration have made in reducing the number of occurrences of zero flow in the river reach immediately below Ft. Randall Dam. This past summer there was a marked decrease in the practice of cycling between high and low releases below the dam. This reduced the dewatering of riverine backwaters and had positive effects on young fish and aquatic insect production, which is vital to fish and bird populations. For the FY 2017-2018 AOP, we recommend that the USACE continue the practice of reduced cycling of releases from Ft. Randall Reservoir throughout the year.

We support the USACE's proposed intent to favor Lake Sakakawea during the 2018 spring fish spawning period, although if runoff conditions allow, rising pools on all three upper reservoirs during the spring fish spawning period would be ideal. A rising pool during the April-to-June spawning period greatly increases the likelihood of successful production of rainbow smelt and

other prey fish that support a thriving sport fishery on which so many river communities rely. In addition to spring water level increases being important to Lake Oahe, a stable to rising water level is critical for a successful walleye spawn on Francis Case. We request the USACE contact us if there is the potential for a spring drawdown of Francis Case, to discuss minimizing impacts to the fishery.

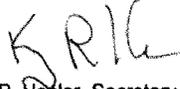
We formally request a mechanism be built into the annual AOP process for State fish and wildlife and water management agencies to be briefed on the current state of water management on the Missouri River system and initial plans for the following year before work on the draft AOP begins in early August. The states should be provided an opportunity to more fully understand how planned system operations, due to basin conditions and the Missouri River Recovery Management Plan, may affect stakeholders within each state and provide this information to the USACE before the Draft AOP is released.

We want to take this opportunity to reiterate that South Dakota does not support the USACE's policy requiring water storage agreements prior to granting access easements for new water diversion intakes. A recent example of how this policy does not make sense for South Dakota is when the USACE refused to allow 90,000 gallons of Missouri River water to be pumped and used, just feet from the Oahe Reservoir, for the reconstruction of a parking lot on state owned land. It is not a permanent diversion, just a short term use of water. This is simply nonsensical.

We believe the direction the USACE is taking in regards to the Reallocation Study, the Surplus Water Reports, and the Proposed Rule Making is an illegal taking of state water rights by denying access to the natural flows of the Missouri River. There are both Constitutional and statutory grounds for claiming the natural flows of the Missouri River belong to those states hosting the main stem reservoirs and those natural flows need to remain under the jurisdiction of the water laws of those states for the beneficial use of their citizens. Just prior to Christmas of 2016 the USACE issued a Notice of Proposed Rulemaking concerning policies governing the use of its reservoir projects within the Missouri River Basin. In March 2017, Governor Daugaard submitted his formal comments concerning the proposed rule stating, "**The proposed rule is unacceptable to South Dakota**". Although the USACE states throughout the document their overall intent of the proposed rule is to avoid interfering with lawful uses of water under State law, simply stating this intent does not result in a rule that achieves it. States' rights to natural flows of navigable waters within their borders are constitutionally founded, and protected, in the Equal Footing Doctrine. Congress acknowledged this states' right in Section 1 of the 1944 Flood Control Act. With these directives from Congress still in place, the USACE should abandon its efforts on the Surplus Water studies, Reallocation Reports, and Proposed Rule Making for Missouri River reservoirs. Furthermore, the USACE should lift the moratorium on pump access easements by rescinding Real Estate Guidance Policy Letter No. 28 and allow users who have obtained state water rights to pump water without further federal interference.

We look forward to the USACE adopting and implementing all of the recommendations we have provided here today. Thank you again for holding this hearing in Pierre.

Sincerely,



Kelly R. Hepler, Secretary  
Department of Game, Fish and Parks



Steven M. Pirner P.E., Secretary  
Department of Environment and  
Natural Resources

cc: Governor Dennis Daugaard  
Senator John Thune  
Senator Mike Rounds  
Representative Kristi Noem  
Lieutenant General Todd T. Semonite  
Colonel John L. Hudson  
Colonel Douglas B. Guttormsen  
John Remus-USACE-Missouri River Water Management  
Greg Sheehan-FWS Headquarters  
Noreen Walsh - FWS Regional Director  
Tom Melius - FWS Regional Director  
Wayne Nelson-Stastny – MRNRC



June 12, 2018

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Senator Rounds  
111 W Capitol Ave, Suite 210  
Pierre, SD 57501

Re: Environment & Public Works Subcommittee on Superfund, Waste Management and  
Regulatory Oversight Committee -- Hearing June 13, 2018

Senator Rounds,

On behalf of the South Dakota Association of Rural Water Systems, Inc. (SDARWS), thank you for the opportunity to submit comments for the record in reference to the above referenced hearing. SDARWS continues to oppose the Corps of Engineers efforts to charge for surplus water and most recently, the federal rulemaking (Docket COE-2016-0016 - Use of Army Corps of Engineers Reservoir Projects for Domestic, Municipal, and Industrial Water Supply) currently pending. I have enclosed herein a letter dated May 8, 2017 which includes the comments filed in the Rulemaking Docket and a letter dated October 10, 2012 which includes the written comments submitted by this Association on the Draft Surplus Water Reports and Environmental Assessments. We would request that these documents be included in the official record of the hearing. On behalf of the Association, we thank you for your continued efforts regarding this important issue.

Thank you,

Very truly yours,

RITER, ROGERS, WATTIER &  
NORTHRUP, LLP

BY: *Margo D Northrup*  
Margo D. Northrup

MDN/gs  
enclosure

Robert C. Riter, Jr  
Margo D. Northrup

Darla Pollman Rogers  
Lindsey Riter-Rapp  
A. Jason Rumpca, Associate

Jerry L. Wattier  
Kody R. Kryss, Associate

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Riter, Rogers, Wattier & Northrup, LLP



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May 8, 2017

**REGULAR AND CERTIFIED MAIL**

U.S. Army Corps of Engineers  
Attn: CECC-L  
441 G. Street NW  
Washington, DC 20314

Re: Docket COB-2016-0016 - (Proposed rulemaking: Use of Army Corps of Engineers Reservoir Projects for Domestic, Municipal, and Industrial Water Supply)

Dear Sir:

On behalf of the South Dakota Association of Rural Water Systems, Inc. (SDARWS), please accept this letter of comments in regard to the above-referenced rulemaking.

SDARWS represents nearly thirty rural water systems, who serve approximately 265 municipalities, various sanitary districts and many other smaller systems that provide water to the people of South Dakota. Our members are opposed to the proposed rulemaking to the extent it interferes with the rightful property of the citizens of the State of South Dakota. Our members provide water to rural customers, numerous communities, municipalities and industrial users. The impacts of the proposed rule will directly impact many South Dakotans and their ability to receive quality drinking water from the Missouri River.

In addition to the various legal issues and concerns that have been identified by other comments, including those of our Governor, SDARWS has some very important questions and concerns and respectfully requests that the Corps of Engineers does not move forward with this rulemaking.

1. Scope. Despite the claim that the purpose of the rule is to provide greater clarity and consistency to the Corps' implementation of Section 6 and the WSA, it is very difficult to ascertain the impact of the proposed rule on individual rural water systems. I have provided a map attached hereto as Exhibit A that identifies the rural water systems that utilize Missouri River water directly or indirectly (by being under the influence of the Missouri's surface water in South Dakota.) As you can tell, this covers a good portion of the state and any proposed rule will directly impact a significant number of citizens in South Dakota. The proposed rule does not clearly identify how rural water systems and organizations will be impacted.

Robert C. Ritee, Jr  
Margo D. Northrup

Darla Follman Rogers  
Lindsey Riter-Rapp

Jerry L. Wattier  
Robert D. Hofer, Of Counsel



2. Cost. SDARWS has consistently opposed having a fee imposed by the Corps of Engineers for the use of the water by the rural water systems. The proposed rule contemplates imposing a fee on the rural water systems for use of water. SDARWS does not support any methodology to determine a "reasonable" price. Any fee will be a financial burden on the rural water systems and ultimately the systems' users.

As you are certainly aware, on August 27, 2012, many of the impacted rural water systems testified in a public meeting regarding the draft Surplus Water Reports and specifically the proposal to charge a fee to the rural water systems. SDARWS also filed written comments following the hearing. I have enclosed those comments herein and request that they be included as part of SDARWS's official comments on the proposed rule (Exhibit B). As was the case in 2012, the Corps of Engineers has not given adequate consideration or study to the socio-economic impacts a mandated fee would impose and its negative impact on rural water customers.

3. Duration of Agreements. The proposed rule contemplates that if the Corps of Engineers determines either surplus water or reallocated water is made available at a Corps facility for a domestic or industrial use, it could potentially be for only a short period of time and renewal of the water supply agreement is at the discretion of the sitting Assistant Secretary of the Army. This is not workable for the rural water systems. Collectively millions of dollars of plant have been invested in the State of South Dakota to serve our customers with quality water. It is impossible to make sound business decisions on agreements that are not long term and agreements that may not be renewed at a later date.

Accordingly, the SDARWS submits that the Corps of Engineers should reverse its position and not pursue the proposed rulemaking.

Thank you.

Very truly yours,

RITEK, ROGERS, WATTIER &  
NORTHROP, LLP

By:

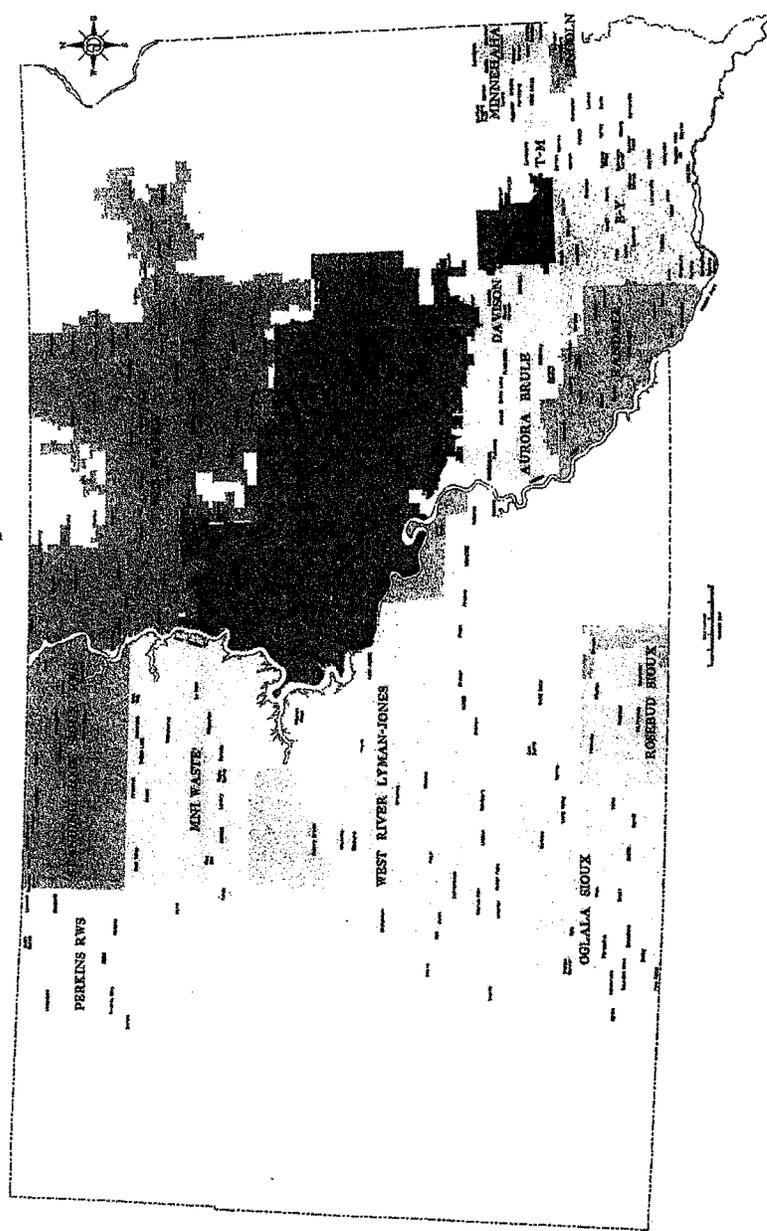
  
Margo D. Northrup

MDN/aec  
enclosures  
cc: Dennis Davis, Executive Director of SDARWS

# EXHIBIT A

# Missouri River Water Users

Rural and Municipal



# EXHIBIT B



12-14  
 319 South Coreau Street  
 P.O. Box 280  
 Pierre, SD 57501  
 Phone: 605-224-5825  
 Fax: 605-224-7102  
 www.ritelaw.com

October 10, 2012

**REGULAR AND CERTIFIED MAIL**

U.S. Army Corps of Engineers,  
 Omaha District CENWO-OD-T  
 ATTN - Surplus Water Report and EA  
 1616 Capitol Avenue;  
 Omaha, NE 68102-4901

Re: M&I Reallocation Study and Surplus Water Reports

Dear Colonel Cross:

On behalf of the South Dakota Association of Rural Water Systems (SDARWS), I want to thank you for allowing us to provide public comment in Pierre, South Dakota on August 27, 2012, and the opportunity to provide written comments on the Draft Surplus Water Reports and Environmental Assessments released by the U.S. Army Corps of Engineers on the four Missouri River Reservoirs in South Dakota.

SDARWS represents nearly thirty rural water systems, who serve approximately 265 municipalities, various sanitary districts and many other smaller systems that provide water to the people of South Dakota. Our members are opposed to the Corps of Engineers' plan to charge a fee or surcharge upon domestic users of Missouri River Water for water or storage of water that is the rightful property of the citizens of the State of South Dakota. Our members provide water to rural customers, numerous communities, municipalities and industrial users. The impacts of any fee mandated by the Corps of Engineers will directly impact many South Dakotans and the fees they pay to receive quality drinking water.

In addition to the various legal issues and concerns that have been identified by other comments, including those of our Governor, Attorney General, and Congressional Delegation, SDARWS has some very important questions and concerns that militate against approval of the proposed plan.

1. Scope. It is very difficult to ascertain the impact on individual rural water systems pursuant to the current Surplus Water Reports. I have provided a map attached hereto as Exhibit A that identifies the rural water systems that utilize Missouri River water directly or indirectly (by being under the influence of the Missouri's surface water in South Dakota.) As you can tell, this covers a good portion of the state and any proposed fee will directly impact a significant number of citizens in South Dakota. The plan lacks clear definition on which systems and organizations will be impacted.

Robert C. Riter, Jr  
 Margo D. Northrup

Daria Pollman Rogers  
 Lindsey Riter-Rapp  
 Robert D. Hofer, Of Counsel

Jerry L. Wattier  
 Thomas Hart, Associate



2. Cost. As a few of our managers shared on August 27, 2012, any mandated storage fee will be a financial burden on the rural water systems and ultimately the system's users. I have attached their comments to this letter and request that the comments be extended into the official record. (See Attachment B). Our members had received differing information from Corps officials as to how any mandated fee would be calculated and assessed against the rural water systems, which ranged from this is a one-time fee, this is a fee that will be paid over a number of set years, or this is a fee that will be assessed annually for an infinite amount of time. There has not been adequate consideration or study given to the socio-economic impacts a mandated fee would impose and its negative impact on rural water customers.
3. Unfair treatment. We do not agree that any storage fee or any fee for that matter should be charged for the water. However, it is very troubling that a different rate structure has been proposed for the different reservoirs. As an example the rural water systems that are associated with Lewis Clark or B-Y Rural Water would be forced to absorb a much higher mandated fee for the same water utilized upstream. Equally concerning is that the citizens of South Dakota will be forced to pay a mandated fee for water or its storage, but the benefits of the water will be enjoyed by downstream states that do not pay any fees.

Accordingly, the SDARWS submits that the Corps of Engineers should reverse its position and not pursue charging a fee to the South Dakotans for water utilized from South Dakota reservoirs.

Thank you.

Very truly yours,

RITER, ROGERS, WATTIER &  
NORTHRUP, LLP

By:

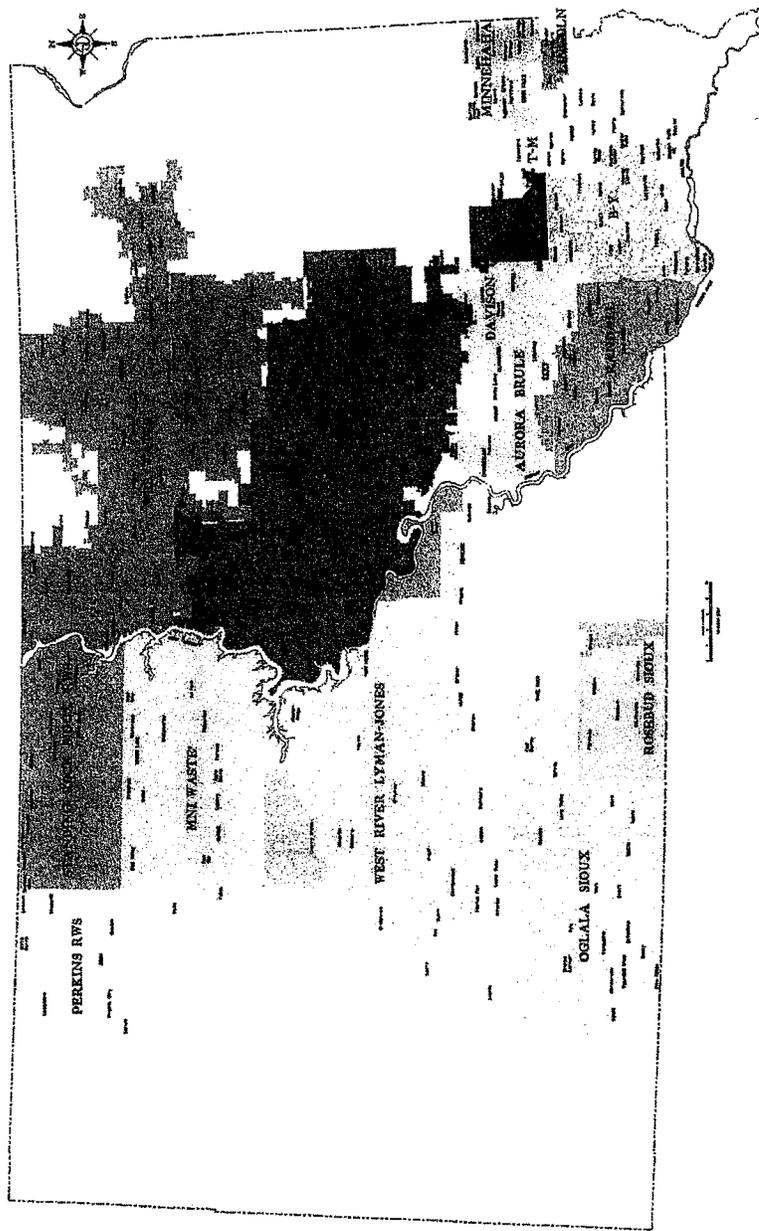
Margo D. Northrup

MDN/cd  
cc: Denny Davis

# EXHIBIT A

# Missouri River Water Users

Rural and Municipal



# EXHIBIT B

## Randall Community Water District

445 Main Street - PO Box 37 - Lake Andes, SD 57356  
605-487-7823 Fax: 487-7824 email: rcwd@rcwd.org



Corps of Engineers  
Lake Francis Case/Lewis & Clark Lake Project  
South Dakota & North Dakota Surplus Water Report

August 27, 2012

Written Testimony of: Alvin Van Zee, General Manager  
Randall Community Water District

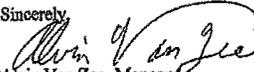
My name is Alvin Van Zee and I am the General Menger for the Randall Community Water District (RCWD) of Lake Andes, SD drawing water from Lake Francis Case. RCWD began in 1976. The District's service area is Charles Mix, Aurora, Davison and Douglas Counties. This service area consists of more than 15 bulk users as towns and villages in these counties, except the city of Mitchell. We also have over 1600 rural farm users. Our population of service is 17,000.

The proposed action of water storage fees imposed for water RCWD diverts from Lake Francis Case will significantly and negatively impact our users, especially our rural farms having dairy operations, fat cattle yards and hog operations. These operators rely only on RCWD to provide water and will see an increase of \$80 per MONTH because of this new fee. These are farms that have been handed to 3<sup>rd</sup> and 4<sup>th</sup> generations and were involved when the Pick Sloan Project was developed. The residents gave up rich farmland on the Missouri because the COE promised them the benefit of having large dams along their property. In imposing this storage fee this same COE is asking the same property owners to again pay for that which was to be a benefit to them and all South Dakotans.

The communities in our service area will also be severely affected by these additional increases. A significant rate increase will stifle community development and growth in an already down economy. Communities were inundated with flooding damages to personal and infrastructure problems last year, and currently are suffering another blow to their economies by the unrelieved drought of this year.

The Missouri River is not only important to residents of this area, it is a National Resource. The happenings here impact the nation as a whole. When the bread basket of the nation is under duress, the nation suffers.

Sincerely

  
Alvin Van Zee, Manager  
Randall Community Water District

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**WEB WATER DEVELOPMENT**  
**Public Hearing August 27, 2012**  
**Pierre SD**

WEB Water Development started construction in 1983 and started serving water to its first customer on May 24, 1986. WEB Water now covers about 5500 square miles while maintaining nearly 6,800 miles of underground pipeline. WEB Water currently delivers water to approx. 8,100 meters at an average rate of 6.2 million gallons per day. Based on last years water production and the proposed rate of \$17.19 per acre foot of water used out of Lake Oahe, this will cost the customers of WEB Water on excess of \$120,000 per year. Our customers are made up of rural residents, including many farmers and ranchers. We also provide water to 28 communities in northeast South Dakota, to include:

Faulkton	Forbes	Frederick	Grenville
Groton	Herried	Hosmer	Ipswich
Leola	Long Lake	Mansfield	Mellette
Mina Lake Sanitary Dist	Northville	Onaka	Pollock
Redfield	Roscoe	Roslyn	Selby
Seneca	Stratford	Warner	Webster
Wecota	Westport	Wetonka	Zeeland

WEB Water also serves water to 77 other bulk customers as well as 5 ethanol plants. This fee not only effects WEB Water but thousands of residents and many businesses in Northeast South Dakota.

**Corps of Engineers  
Oahe Dam / Lake Oahe Project  
South Dakota & North Dakota  
Surplus Water Report**

**Public Hearing  
August 27, 2012 – 4:30 PM (CDT)**

**Testimony of:  
Kurt Pfeifle, General Manager  
Mid-Dakota Rural Water System, Inc.**

**Introduction:**

My name is Kurt Pfeifle. I am the General Manager of the Mid-Dakota Rural Water System, and we are headquartered in Miller, SD. The Mid-Dakota Rural Water System is a potable rural and regional water supply system, providing treated drinking water to all or portions of 14 counties in central South Dakota. Lake Oahe Reservoir on the Missouri River is the only water source we currently use. Mid-Dakota annually diverts over 1.7 billion gallons of water; we treat it and deliver the potable water through over 4,000 miles of pipeline to 5,400 metered customers representing service to thousands of farms and ranches, plus we provide drinking water to 28 communities through individual or bulk service. We supply water to a population of 32,000 South Dakotans as well as an unquantifiable number of livestock. The results of decisions of the Corps of Engineers and the proposals contained in the Surplus Water Report will have a huge effect on Mid-Dakota and the people we serve.

**Opposition to the plan:**

I appear here today in opposition of the Draft Surplus Water Report. There are a myriad of legal reasons why we oppose the plan, ranging from the Corps' failure to consider "natural flows" of the River to challenges of the State's sovereign authority. I will focus my comments on how the proposals of the draft report will affect Mid-Dakota specifically and let our Governor, Attorney General and the State's Congressional Delegation focus on the larger issues of the 1944 Flood Control Act and sovereignty issues presented therein. Mid-Dakota

specifically voices strong opposition to the idea that entities like Mid-Dakota should be charged a water storage fee of \$17.19 per acre foot, or any fee for that matter. Using the figure of 10,000 acre feet which is the amount of water reserved in our State water right, this will burden the System with another \$171,900 per year in expense. This is an expense that will have to be passed down to our customers, and it's an expense they should not have to bear. The Mid-Dakota Rural Water System is a congressionally authorized water project... Authorized by Public Law 102-575. To avoid a protracted explanation of the Act that Authorized Mid-Dakota, I will simply state that the Act provided subsidies to Mid-Dakota to build an expansive water supply system. The reason the Project was subsidized by nearly 75% federal grant was to make the water affordable to the end users. The fees imposed by the Surplus Water Agreements will place a burden upon the Water Users of Mid-Dakota that the United States Congress did not envision and did not intend. Furthermore the authorizing Act references the Mid-Dakota Final Engineering Report... a report that clearly delineates the withdrawal and use of Missouri River water for domestic and livestock purposes... In short the United States Congress specifically authorized the use of Lake Oahe as Mid-Dakota's water source. Additionally the authorizing law has an entire section (section 1909) devoted entirely to the recognition and preservation of the State's water rights. In part the law states "Nothing in this title shall be construed to - (1) invalidate or preempt State water law... presumably if an entity was to refuse to pay the storage fee the Corps could invalidate or preempt state water law by disallowing the withdraw of water from the reservoir.

**Full-time equivalent employees:**

Mid-Dakota is a frugal not-for-profit company; we are overseen by an elected board of nine directors that demands their staff carefully scrutinize each and every expense. Mid-Dakota has since its beginning operated with a staff that we consider "bare-bones" - the least amount of bodies needed to perform the necessary duties and tasks inherent of a water delivery system. As manager of the company, I tend to view much of our expense in terms of "full-time equivalent employees" or FTEs. The expense the Corps would place on Mid-Dakota is roughly

the equivalent of about three FTEs for our system. The fees proposed would have the effect of telling Mid-Dakota that this fee, (one ostensibly envisioned nearly 70 years ago and never implemented), is now so pressing and important that Mid-Dakota should put off hiring additional staff and pay the government for storing water instead. Moreover, and more likely, the action may result in Mid-Dakota reevaluating its operation and having to decide if we can get by with three FTEs fewer. I'm at a loss deciding which of our 23 employees we should do without?

### **Legacy Farms:**

I would also point out that decades ago the Federal government began building the dams on the Missouri River. Once completed the dams began filling up, and using the figures in the Surplus Water Report, over 312,000 acres of land was inundated by Lake Oahe. Many of the farms and ranches of this era did not wish to give up their land for this purpose but were given no choice in the matter. Many found themselves having to relocate their homesteads to continue their operations or worse found themselves having to abandon their life of farming or ranching altogether. In the ensuing 50 – 60 years, many of these farms and ranches did change hands, but I submit that most of the changes were legacy transactions... a passing of the farms and ranches to their heirs. Today these same farms and ranches are faced with our government, through the proposal of the Surplus Water Report, charging them directly or indirectly for the costs associated with taking their lands and flooding it. Many of these people and the legacy farms and ranches they operate are members of the Mid-Dakota system. If the Corps imposes the water storage fees contained in the Surplus Water Report, then most assuredly these folks will be faced with paying a portion of this fee. From my perspective, implementation of a water storage fee would become the ultimate "unfunded mandate". The owners of the property had little to say back in 1944 in the taking of their land... hence "mandate" ... and now those very landowners or their heirs are being told they will have to pay the costs of development.

**Fairness:**

The unfairness of the water storage fee in a framework outside of Mid-Dakota is very apparent. The "Secretary of War" envisioned back in 1944 that someday a reason or need may present itself for the Federal government to start charging for water. I don't believe that the Corps has presented a compelling reason for this to be done. It appears to me as I read the draft report that the prevailing reason the Corps is proposing the fees is because of a perceived mandate contained in the Act and direction from the Corps' upper echelons that fees are required to comply with the Act. I disagree with that and would note that the word "MAY"... not MUST is used in this context in the Act. The Act also states that "these agreements "may" (note the word "may") be for domestic, municipal and industrial uses, but not for irrigation [emphasis added]. This statement is vague; besides using the word "may" which is hardly a mandate, the statement can be interpreted to encompass many things... MR&I water supplies, storage for production of hydro-power, storage for flood control, recreation, etc... etc... the only thing I see specifically left out of this equation is "Crop Irrigation". For any other supposed "beneficiaries of stored water" that may be listening to or following these public hearings, if they believe their "use" of stored water is in some manner immune from consideration... I submit they may be unaware of the military term "mission creep"! Also on the thesis of fairness, I would point out that a short, easily overlooked part of the Report states "The Bureau of Reclamation indicated that there could be fairly large BOR MR&I projects in the next 10 years, but they wouldn't require water agreements with the Corps, as they will be specifically authorized by Congress to use Missouri River water." Mid-Dakota was designed with this use in mind, we a few other BOR Projects could be considered "exempt" from the water use agreements and therefore the water storage charge. While I agree with that statement and feel strongly that Mid-Dakota should not have to bear these charges, I add that Mid-Dakota cares about its neighbors as well... whether they be another rural or regional water supplier or a municipality... they too should be recognized as legitimate authorized users of the Missouri River and not subject to a water storage charge.

**Decisions already made:**

I view this public meeting today not so much a "Public Hearing" - a gathering of data and opinions of the public, but more as a "Public Lecture," an effort of the Corps telling the public what they intend to do... I explain my reasoning for this view with an excerpt from the *Jamestown, ND - Sun* -- News article from January 20, 2011... where the Sun reported on a hearing much like this one today:

*[Quoted from the Sun] "North Dakotans shouldn't feel singled out, though, according to corps spokeswoman Monique Farmer. The plan includes users of each of the reservoirs throughout the Missouri River Basin within the Omaha District boundary. Although it's never been done before, Farmer said corps officials have been told by their superiors that they must be in compliance with the 1944 Flood Control Act, which the corps said gives the agency the authorization to charge a fee for water agreements with states, municipalities and others.*

***"There is going to be a fee [emphasis added] for taking water out of the lake,"** Farmer said.*

The statement "there is going to be a fee for taking water out of the lake" sounds pretty definitive to me, sounds like decisions have already been made! Finally, I would call upon the Corps of Engineers to put an end to this process... to admit the mistake and fallacy of the interpretation that implementing a water storage charge for water uses on the Missouri River is something mandated by the Act and that the Corps must and is simply complying; to put it simply... I don't believe it!

Thank you for allowing me to comment here today.

**Corps of Engineers  
Gavins Point Dam / Lewis and Clark Lake Project  
South Dakota & North Dakota  
Surplus Water Report**

**Public Hearing  
August 27, 2012 – 4:30 PM (CDT)**

**Testimony of:  
Terry Wootton, General Manager  
Bon Homme – Yankton Water District**

My name is Terry Wootton and I am the General Manager for the B-Y Water District based out of Tabor, South Dakota. The Bon Homme-Yankton (B-Y) Water District began service in 1979. The District's core service area is comprised of Bon-Homme, Yankton and Hutchinson Counties as well as northwest Douglas and southwest Turner Counties. This service area encompasses in excess of 2,200 square miles. The system consists of more than 2,500 miles of various sized pipe, 36 pumping stations and 19 storage tanks or elevated tanks. The District serves 13 communities bulk quantities of water. These communities are Utica, Irene, Mission Hill, Volin, Avon, Scotland, Lesterville, Tabor, Tyndall, Parkston, Menno, Freeman and Mitchell. This short list does not take into account the numerous smaller communities where B-Y provides the water directly to the citizens. The District also provides bulk water delivery to the rural water systems of Hansen and Turner-McCook. Within the service area described B-Y has a total of 4,650 individual service connections supplying water to a population in excess of 27,000 individuals.

What will this Action by the Army Corps of Engineers mean to all of these citizens of the State of South Dakota and members of the B-Y Water District? In an average year B-Y draws 1,949,566,533 gallons or 5,983 Acre feet of water from the Lewis and Clark Lake. When using the current Army COE proposed rate for "Surplus Water" of \$174.66 per Acre foot of water drawn, B-Y would have to pay approximately \$1,045,000 annually to the COE. Last year across our system an average individual user consumed approximately 8,000 gallons per month or 96,000 gallons per year. With this consumption the COE proposed rate would cost the individual user approximately \$52 annually, or as a whole these users would pay \$240,000. The remaining \$805,000 will have to be adsorbed by the 13 communities and 2 rural water systems previously mentioned. As you can see these figures quickly add up and have the potential to be a devastating impact on the economies and the future growth of these areas.

Another point of interest is mentioned on page 2-11 of the Gavins Point/Lewis and Clark Lake Project report. The report discusses the unprecedented runoff and record rainfall that occurred in 2011. This in turn caused the COE to release 160,000 ft<sup>3</sup>/sec through the Gavins Point facility. When extrapolating this 160,000 ft<sup>3</sup>/sec figure to a daily release number it can be found that over 103,410,662,400 gallons/day were released. This converts to 317,355.7 Acre feet of water per day. This daily average is more than B-Y Water District could use in 52 years of drawing water from Lewis and Clark Lake.

In closing, just over 50 years ago, on August 17, 1962, President John F. Kennedy was at the Oahe Dam to dedicate the powerhouse and lake. He commented, "There could be no view of this country more erroneous than Members of the Congress, or the Executive, or the citizens of different States to believe that what happens here in South Dakota is important only to the people of South Dakota"....and that "What happens in this basin helps all the people of all the country. We take for granted these miracles of engineering and too often we see no connection between this dam (Oahe) right out here and our Nation's prosperity and our Nation's security and our leadership all around the world. The facts of the matter are that this dam, and many more like it, are as essential to the expansion and growth of this American economy as any measure that Congress is now considering and this dam and others like it are as essential to our national strength and security as any military alliance or missile complex." He continued, "We cannot prevent other people in this country from developing their resources...if we do that, we shall stand still and forget the lesson that our history has told us." I believe these comments ring true yet today, especially in regards to the local economies. B-Y Water District is only one cog in the South Dakota economy or even the greater mid-west economy and this action will have a negative effect on all.

My goal is the same as others here presenting this evening. I implore you listen to all the information presented, not only at this meeting but all the public meetings. Review all the written responses that will be flooding into the COE offices. Then hopefully you will reconsider this action and emerge with the decision that instead of putting restrictions on the people and economies of the Missouri River Basin by enacting these proposed "Surplus Water" charges, instead you will decide to place these studies on the shelf next to many other ill-conceived and abandoned government programs.

*Aurora-Brule*  
**Rural Water System, Inc.**  
P.O. Box 140  
Kimball, South Dakota 57355  
Phone 778-6119

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October 9, 2012.

U.S. Army Corps of Engineers  
Omaha District

RE: Surplus Water Report

Dear Sirs:

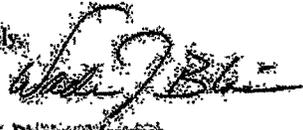
I am writing in opposition of the proposed Missouri River storage fees that the Corps of Engineers is planning to impose on those taking water from the river, which would include rural water systems.

Aurora-Brule Rural Water System is located in central South Dakota. We divert water from Lake Francis Case, and provide treated water for domestic use and livestock watering to over 1200 homes, farms and ranches in Aurora, Brule and Buffalo counties, and portions of Jerstad, Davison and Douglas counties, including the towns of Pukwana, Kimball, White Lake, Snelzey and Plankinton. Our only feasible source of water is the Missouri River.

Based on the proposed storage fee levels, our system would incur an added annual cost of \$20,000. This added cost would obviously be passed on to our water system members and would put a hardship on home owners, farmers and livestock producers in our area.

Please reconsider your proposed action and allow the people of South Dakota to utilize the water that belongs to them without added costs.

Sincerely,



Wade J. Blasius, Manager



June 13, 2018

Honorable Senator Mike Rounds  
 Chair, Subcommittee on Superfund, Waste Management and Regulatory Oversight  
 Hart Senate Office Bldg., Suite 502  
 Washington, DC 20510

RE: Oversight of the Army Corps' Regulation of Surplus Water and the Role of States' Rights

Chairman Rounds,

Thank you for the opportunity to provide information to the Subcommittee regarding the Army Corps of Engineers' Regulation of Surplus Water and the Role of States' Rights. These comments are provided on behalf of the National Water Supply Alliance (NWSA), which is a newly-formed organization consisting of local, regional, State, and interstate agencies with an interest in the Corps' water supply program. Many of our members hold storage contracts, and all have a strong interest in integrating the storage service provided by the Corps into their water supply plans.

As you are aware, in November 2017, the Corps closed the comment period on a proposed rule that would define how and under what conditions states and water suppliers would be able to access storage in Corps reservoirs for water supply purposes. The Corps is currently reviewing comments received and preparing to respond to those comments with a final rule. As described below, we strongly oppose the rule's intrusion on States' authority to allocate water and to manage water resources within their borders—especially the provisions relating to the definition of surplus water, storage accounting, and made inflows. We recognize the unique role the Corps serves in water storage and reservoir management. However, water rights, allocation, and management are reserved powers of the States under federal law. The Corps' storage and operation of storage can have significant impact on the water supply of a State and individual citizens. As such, the Corps must engage state water right and water management agencies to ensure Corps actions do not impede a State's ability to carry out its duties.

As sovereign entities in our federal system, States have inherent authority to regulate the use of water within their borders. The Supreme Court has called this "power to control ... public uses of water ... an essential attribute of sovereignty." *United States v. Alaska*, 521 U.S. 1, 5 (1997). States' rights in this respect are absolute, subject only to the rights since surrendered by the Constitution to the general government.

Given the importance of states' control over water, the proposed rule, and numerous historic examples, has substantial "federalism implications." The crux of the issue lies in the necessary distinction between storage and water. Properly differentiated, the Corps rightly develops and manages storage within a given reservoir. Allocation of water, and management of that water within a broader system, is a right and responsibility reserved to the states.

Numerous examples exist where Corps' action has crossed the federal/state responsibility line. As the purpose of the hearing correctly establishes, the application of the surplus water authority is a prime example. The Corps' development of reservoir impoundments on natural flowing rivers does not eliminate the river itself. This distinction was emphasized in Congressional debates about the federal

water programs from the earliest days. For example, in the debates in Congress that preceded the Reclamation Act of 1902, the Chairman of the House Committee on Public Lands and sponsor of the bill (Rep. Lacey) found it necessary to put members at ease by emphasizing the distinction between the control of a reservoir and the control of water rights:

A reservoir site without water is entirely useless. The water is the particular thing in question, and the waters are controlled by the States through which they flow, and not by the United States of America. These are surface waters, the waters of small streams not navigable, and the States control them.

Recent application of the surplus water authority has strayed from this Congressional intent. Corps insistence on the sale of the water, or the entering into a long term water supply contract, for an entity to access a water source that prior to the reservoir was an adequate and free flowing river oversteps the federal role to provide flood protection or navigation.

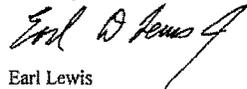
Application of storage accounting methods at Corps' reservoirs has also extended beyond its appropriate role. Across the nation, from Washington to Texas to Georgia, the Corps has developed reservoir accounting procedures that clearly allocate water. In more than one of these cases, the state in which the reservoir resides has taken action to determine how water flowing into the reservoir sites should be allocated. The state action also recognizes and protects the purpose for which the federal infrastructure has been developed, but does so in a way that promotes efficient use of the water and local investment in infrastructure.

The proposed water supply rule would also require that storage contracts include "appropriate mechanisms for accounting for actual storage usage and available water supply storage on a continuing basis." This statement again encroaches on states' authority to allocate water rights. Any mechanism employed by the Corps today or in the future should track the use of storage—how much space in a reservoir is being used to store water for a particular user or use—as opposed to the uses of water itself. Such storage accounting should be based on actual measured reservoir levels, streamflow, withdrawals and releases, and return flows where possible. Additionally, both the accounting methods and results should be clear, transparent, and readily available to all interested parties.

The appropriate federal role in water related matters has been debated and legislated for more than a century. The common and consistent thread, however, has been that states retain the right and responsibility to allocate and manage water within their boundaries. While the pressure on the Corps to balance various water using interests is significant, it does not permit nor excuse federal action that crosses this legal boundary. Previous action to limit federal authority related to water allocation was wise and well-reasoned. The interests served by water vary greatly across our nation, and between individual states. Water allocation and management is best accomplished when it is left to individual states.

Thank you for the opportunity to provide input to the Subcommittee. NWSA stands ready to provide additional information or assist as you continue your work on this important issue.

Sincerely,



Earl Lewis  
President  
National Water Supply Alliance



DENNIS DAUGAARD  
GOVERNOR OF SOUTH DAKOTA  
CHAIR

DAVID IGE  
GOVERNOR OF HAWAII  
PRES. CHAIR

JAMES B. OGBURY  
EXECUTIVE DIRECTOR

October 17, 2017

U.S. Army Corps of Engineers  
ATTN: CECW-CO-N  
441 G Street, N.W.  
Washington, D.C. 20314

Re: COE-2017-0004 – Review of Existing Rules

Dear Sir or Madam:

The U.S. Army Corps of Engineers has issued a Request for Comment as part of its Regulatory Reform Task Force, Review of Existing Rules in accordance with Executive Order 13777, Enforcing the Regulatory Reform Agenda.<sup>1</sup> Section 3(e) of Executive Order 13777 requires each agency's Regulatory Reform Task Force, in evaluating an agency's regulations, to "seek input and other assistance, as permitted by law, from entities significantly affected by federal regulations, including state, local, and tribal governments, small businesses, consumers, non-governmental organizations, and trade associations."<sup>2</sup>

#### Statement of Interest

The Western Governors' Association (WGA) represents the governors of 19 western states and three Pacific territories, and is an instrument of the governors for bipartisan policy development, information exchange, and collective action on issues of critical importance to the western United States. The elected and appointed officials of the western states have a long history of responsible land and resource management and of working collaboratively with federal administrative agencies. States have an historic and unique relationship with the Corps, largely due to states' inherent authority over water resources, as well as their statutorily-delegated authorities under the federal Clean Water Act (CWA).

WGA Policy Resolution 2017-01, *Building a Stronger State-Federal Relationship*, observes that the strength of the federal-state partnership in resource management has diminished in recent years.<sup>3</sup> In many cases, agency rules and regulations have encroached on state legal prerogatives, neglected state expertise, and diminished the statutorily-defined role of states in managing federal environmental protection programs. Western Governors appreciate the Corps' recognition of the need for a comprehensive review of agency policies and regulations and welcome the opportunity to provide the Corps with their insights and perspective.

<sup>1</sup> Request for Comment, 82 Fed. Reg. 33470 (Jul. 20, 2017); Extension of Comment Period, 82 FR 43314 (Sep. 15, 2017).

<sup>2</sup> Exec. Order No. 13777 (Feb. 24, 2017), *published in* 82 Fed. Reg. 12285 (Mar. 1, 2017).

<sup>3</sup> Western Governors' Association Policy Resolution 2017-01, *Building a Stronger State-Federal Relationship*. Available at: [http://westgov.org/images/editor/PR\\_2017-01\\_State\\_Federal\\_Relationship.pdf](http://westgov.org/images/editor/PR_2017-01_State_Federal_Relationship.pdf).

U.S. Army Corps of Engineers  
 October 17, 2017  
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#### **Proper Consultation with State Officials in the Rulemaking Process**

As stated in WGA Policy Resolution 2017-01, federal agencies, “should be required to have a clear and accountable process to provide each state – through its Governor as the top elected official of the state and other representatives of state and local governments as he or she may designate – with early, meaningful, and substantive input in the development of regulatory policies that have federalism implications.”<sup>4</sup> Similarly, in WGA Policy Resolution 2017-04, *Water Quality in the West*, Western Governors urge the Corps “to engage the states as co-regulators and ensure that state water managers have a robust and meaningful voice in the development of any rule regarding CWA jurisdiction, particularly in the early stages of development before irreversible momentum precludes effective state participation.”<sup>5</sup>

The Corps has contemplated the concept of consultation in the context of its engagement with federally-recognized Indian tribes. In this particular context, the Corps has defined “consultation” as an:

Open, timely, meaningful, collaborative and effective deliberative communication process that emphasizes trust, respect and shared responsibility. To the extent practicable and permitted by law, consultation works toward mutual consensus and begins at the earliest planning stages, before decisions are made and actions are taken; an active and respectful dialogue concerning actions taken by the USACE that may significantly affect tribal resources, tribal rights (including treaty rights) or Indian lands.<sup>6</sup>

This consultation policy is based upon the principle that federally-recognized Indian tribes possess sovereign status and are to be afforded government-to-government, pre-decisional consultation in the development of any Corps’ rule which may significantly affect tribal resources, rights, or lands. The Corps’ tribal consultation policy also recognizes that “each of the 565 federally recognized American Indian and Alaska Native Tribes are distinct and separate governments, requiring a consultation process that may be completely unique to them.”

States – possessing sovereign authorities under the U.S. Constitution, as well as delegated authorities under federal statute – should be afforded a similar opportunity for robust and complete consultation as part of any agency rulemaking which may have significant impacts on states’ resources, rights, or lands. The Corps should develop rules and policies to establish comprehensive procedures for consultation with states, recognizing states’ sovereignty and requiring agency officials to conduct pre-decisional government-to-government state consultation.

#### **Respecting States’ Primary Authority over Water Resources**

Nowhere is effective state consultation more important than in the context of water resources. States possess primary authority for managing, allocating, administering, protecting, and developing their water resources and are primarily responsible for water supply planning within

<sup>4</sup> *Id.*

<sup>5</sup> Western Governors’ Assoc., Policy Resolution 2017-04, *Water Quality in the West*. Available at: [http://westgov.org/images/editor/PR\\_2017-04\\_Water\\_Quality.pdf](http://westgov.org/images/editor/PR_2017-04_Water_Quality.pdf)

<sup>6</sup> [http://www.usace.army.mil/Portals/2/docs/civilworks/tribal/CoP/2013\\_nap\\_brochure.pdf](http://www.usace.army.mil/Portals/2/docs/civilworks/tribal/CoP/2013_nap_brochure.pdf)

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their boundaries. State water laws have developed over the course of decades to reflect local customs and necessities. Accordingly, these state laws – and the regulatory frameworks within which they operate – are complex and diverse. Deference to states' primacy in water management and allocation decisions is a well-established principle of federal case law and is unambiguously repeated throughout federal statutory authority. The U.S. Supreme Court has consistently held that states established their sovereign authority over water resources upon their admission to the Union under the Equal Footing Doctrine of the Constitution and continue to rightfully exercise such authority under their own laws.<sup>7</sup> States' authority over water resources, and the legal structures under which such authority is executed, must receive effective and express deference where any Corps action threatens any type of federal preemption.

Two rules currently being developed by the Corps exemplify the need to clearly recognize and respect this important balance of powers:

- **Defining "Waters of the United States"**

States should be consulted and engaged in any Corps rulemaking which defines "waters of the United States" or affects states' authority under the CWA, which expressly provides that "the authority of each state to allocate quantities of water within its jurisdiction shall not be superseded, abrogated, or otherwise impaired by this Act."<sup>8</sup> Western Governors previously expressed their concerns to the Corps regarding the lack of substantive state consultation during the promulgation of the 2015 Clean Water Rule.<sup>9</sup> Renewed rulemaking efforts addressing this critical subject have been encouraging, as the Corps and EPA have conducted early outreach with states. Importantly, these efforts have involved direct communications with individual states through their Governors. WGA strongly urges the Corps to pursue ongoing consultation with Governors throughout the substantive development of any new rule affecting the scope of the CWA.

- **"Surplus Water" Rule**

On December 16, 2016, the Corps issued a Notice of Proposed Rulemaking (NPRM) to address its policies governing the use of Corps reservoir projects within the Upper Missouri River Basin and the treatment of purported "surplus water" within that system.<sup>10</sup> In response to the NPRM, Western Governors submitted comments expressing their concerns regarding both the substance of the proposed rule and the process by which it had been developed. Specifically, the governors' cited: (i) the Corps' failure to conduct adequate consultation with potentially-affected states, or to include a proper assessment of the proposed rule's potential federalism implications as required by Executive Order 13132; (ii) the various potential preemptive effects of the proposed rule on states' primary and federally-delegated authorities over their water resources; and (iii) the Corps' overly-

<sup>7</sup> See, *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935); *California v. United States*, 438 U.S. 645 (1978); *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001); *Rapanos v. United States*, 547 U.S. 715 (2006).

<sup>8</sup> 33 U.S.C. § 1251(g).

<sup>9</sup> Western Governors' Assoc. Letter, Nov. 14, 2015. Available at: [http://westgov.org/images/editor/LTR\\_Waters\\_of\\_the\\_US\\_Comments\\_Final\\_1.pdf](http://westgov.org/images/editor/LTR_Waters_of_the_US_Comments_Final_1.pdf)

<sup>10</sup> 81 Fed. Reg. 91556 (Dec. 16, 2016).

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broad definition of the term "surplus waters" to include natural, historic river flows over which states possess primary legal authority.<sup>11</sup> Western Governors are concerned that the procedural, legal, and technical issues which arose under this rulemaking process remain unaddressed in Corps' rulemaking policies.

**Conclusion**

WGA appreciates the opportunity to provide this assessment of areas in which the communication and collaboration between the Corps and state governments can be reinforced and strengthened.

Western Governors are excited to work in true partnership with federal administrative agencies toward positive and productive outcomes. By operating as authentic collaborators on the development and execution of agency rules and policy, states and federal agencies can demonstrably improve their service to the public.

We look forward to working with the Corps in this effort and appreciate your attention to these important matters.

Sincerely,

  
James D. Ogsbury  
Executive Director

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<sup>11</sup>Western Governors' Assoc. Letter, Feb. 27, 2017. Available at:  
[http://westgov.org/images/editor/USACE\\_Surplus\\_Waters\\_Rule\\_-\\_final.pdf](http://westgov.org/images/editor/USACE_Surplus_Waters_Rule_-_final.pdf).



DENNIS DAUGAARD  
GOVERNOR OF SOUTH DAKOTA  
CHAIR

DAVID IGE  
GOVERNOR OF HAWAII  
VICE CHAIR

JAMES D. OGSBURY  
EXECUTIVE DIRECTOR

June 6, 2018

The Honorable R.D. James  
Assistant Secretary for the Army for Civil Works  
U.S. Army Corps of Engineers  
441 G Street, N.W.  
Washington, D.C. 20314

Dear Assistant Secretary James:

We are writing to express the continued concerns of Western Governors regarding the U.S. Army Corps of Engineers' proposed rulemaking, Policy for Domestic, Municipal, and Industrial Water Supply Uses of Reservoir Projects Operated by the Department of the Army, U.S. Army Corps of Engineers (RIN 0710-AA72, Docket ID: COE-2016-0016). The proposed rule, which would affect Corps water reservoir projects located in western states, threatens to interfere with those states' primary authority to manage and allocate water resources within their boundaries. [The Spring 2018 Unified Agenda of Regulatory and Deregulatory Actions](#) schedules "Final Action" on the proposed rule for January 2019 and "Final Action Effective" for March 2019. It remains unclear to Western Governors how the Corps plans to engage with, and respond to, states as it moves forward in its rulemaking process.

On December 16, 2016, the Corps issued a [Notice of Proposed Rulemaking](#) (NPRM) to address its policies governing the use of Corps reservoir projects within the Upper Missouri River Basin and the treatment of "surplus water" within that system. In response to the NPRM, the Western Governors' Association (WGA) submitted [comments](#) expressing concerns about both the substance of the proposed rule and the process by which it had been developed.

Specifically, the Governors' comments cited: (i) the Corps' failure to conduct adequate consultation with potentially-affected states, or to include a proper assessment of the proposed rule's potential federalism implications as required by Executive Order 13132, Federalism; (ii) the various potential preemptive effects of the proposed rule on state authority over water resources; (iii) the Corps' overly-broad definition of the term "surplus waters" to include natural, historic river flows over which states possess primary legal authority; and (iv) the denial of, or interference with, access to Corps projects for the lawful diversion and appropriation of water under state law. Several other western states also submitted [comments](#) to the Corps in response to its NPRM, largely reiterating and expanding upon the concerns expressed by WGA.<sup>1</sup>

<sup>1</sup> Western States that submitted comments to the Corps in response to the NPRM include: [The State of Idaho](#); [the State of Nebraska](#); [the State of North Dakota](#); [the State of Oklahoma](#); and [the State of South Dakota](#). Comments were also submitted by the [Western States Water Council](#); [North Dakota Water Commission](#); [North Dakota Water Users Association](#); [Association of California Water Agencies](#); and the [Texas Commission on Environmental Quality](#).

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Western Governors' concerns regarding this issue were initially raised in an August 21, 2013 letter to then-Assistant Secretary of the Army (Civil Works) Jo-Ellen Darcy. We cited the Corps' failure to adequately engage with states in its then-pending rulemaking relating to surplus waters. Similarly, on August 6, 2013, the Western States Water Council (WSWC) sent a letter to Assistant Secretary Darcy citing shortcomings in the rulemaking process and a lack of regulatory clarity on several critical implementation issues. Western Governors are concerned that the procedural, legal, and technical issues cited in comments and letters, as well as the views and concerns expressed by individual states, have still not been addressed by, or incorporated in, the Corps' decision-making processes in the development of the proposed rule.

States have an historic and unique relationship with the Corps and a vital role in the implementation of several Corps programs, due to states' inherent and sovereign authority over water resources, as well as their statutory role as co-regulators under the federal Clean Water Act. As stated in WGA Policy Resolution [2017-01](#), *Building a Stronger State-Federal Relationship*, federal agencies "should be required to have a clear and accountable process to provide each state – through its Governor as the top elected official of the state and other representatives of state and local governments as he or she may designate – with early, meaningful, and substantive input in the development of regulatory policies that have federalism implications."

In its 2016 NPRM, the Corps states that the proposed rule is "intended to enhance the Corps' ability to cooperate with state and local interests in the development of water supplies in connection with the operation of its reservoirs," and that it "endeavors to operate its projects for their authorized purposes in a manner that does not interfere with the States' abilities to allocate consumptive water rights, or with lawful uses pursuant to State, Federal, or Tribal authorities." As of this date, the Western Governors are unaware of any meaningful outreach on the part of the Corps to engage with states – or respond to their expressed concerns – as part of this rulemaking effort.

Western Governors have a history of responsibly exercising their authority for comprehensive water management within their states and of working cooperatively with various federal agencies in connection with that responsibility. We reiterate our concerns about the Corps' proposed rule, as described in its NPRM, for the following reasons:

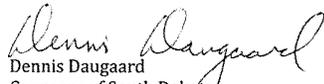
- Western Governors continue to believe that the proposed rule does, in fact, have federalism implications which trigger the expanded state consultation requirements of Executive Order 13132.
- As the primary authority over water management and allocation within their borders, states must not be required to relinquish or subordinate their sovereign authority over the natural flows of rivers impounded by the Corps or any other federal agencies.
- Legally, the Corps must define "surplus water" to expressly exclude natural flows (and any quantification of such flows) which would have occurred without the development of federal water projects. Natural flows must remain subject to states' authority to allocate water resources for beneficial uses.

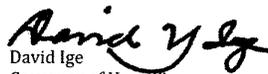
The Honorable R.D. James  
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- The Corps should not deny, or interfere with, access to divert and appropriate natural flows (i.e., water which would have been available without the construction of Corps impoundments) in its reservoir projects. Similarly, the Corps should not charge storage fees to water users where such users are making withdrawals of natural flows within Corps reservoirs.

Western Governors strongly urge you to engage in meaningful, substantive, and ongoing consultation with states before moving forward with any efforts to develop the proposed rule and to respond to our consistently expressed concerns regarding this matter.

Sincerely,

  
Dennis Daugaard  
Governor of South Dakota  
Chair, WGA

  
David Ige  
Governor of Hawai'i  
Vice Chair, WGA