



## WESTERN GOVERNORS' ASSOCIATION

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February 27, 2017

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

Re: COE-2016-0016 – Use of U.S. Army Corps of Engineers Reservoir Projects for Domestic, Municipal & Industrial Water Supply

Dear Sir or Madam:

The U.S. Army Corps of Engineers (USACE) has issued a Notice of Proposed Rulemaking concerning policies governing the use of its reservoir projects within the Missouri River Basin, pursuant to Section 6 of the Flood Control Act of 1944, 33 U.S.C. § 708, and the Water Supply Act of 1958, 43 U.S.C. § 390b, (hereafter the “NPRM”). Specifically, USACE invites interested parties to comment on, “the proposed definition of ‘surplus water,’ for purposes of Section 6.”<sup>1</sup>

### **Statement of Interest**

WGA represents the governors of 19 western states, as well as three U.S.-flag islands, 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.

States are the primary legal authority for the allocation, management, protection, and development of water resources, and are responsible for water supply planning within their respective borders. The NPRM suggests regulations that would affect USACE water reservoir projects located within the boundaries of upper Missouri River Basin states, the Governors of which are members of WGA.

### **Western Governors’ Analysis and Recommendations**

WGA has previously expressed its concerns to USACE regarding any administrative actions intended to regulate so-called “surplus waters.” On August 21, 2013, WGA issued a letter to the Honorable Jo-Ellen Darcy, Assistant Secretary of the Army (Civil Works), regarding USACE’s failure to adequately engage with states in its pending rulemaking relating to surplus waters.<sup>2</sup> Similarly, on August 6, 2013, the Western States Water Council (WSWC) sent a

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<sup>1</sup> 81 FR 91556, Dec. 16, 2016.

<sup>2</sup> Available at: <http://westgov.org/letters-testimony/342-water/503-letter-army-corps-of-engineers-surplus-water-rulemaking>.

letter to Assistant Secretary Darcy citing shortcomings in the rulemaking process and a lack of regulatory clarity on several critical implementation issues.<sup>3</sup> Western Governors are concerned that the procedural, legal, and technical issues cited in both letters were not addressed by USACE in advance of the development and announcement of the NPRM.

### **Consultation Deficiencies**

Western Governors have been explicit regarding what, in their estimation, constitutes proper “consultation” between federal agencies and states. As stated in WGA Policy Resolution 2017-01, *Building a Stronger State-Federal Relationship*, 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.” Consistent with gubernatorial policy, Executive Order 13132, “Federalism,” requires federal agencies, including USACE, 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>4</sup>

In the NPRM, USACE declares that it, “do[es] not believe that the proposed rule has Federalism implications.”<sup>5</sup> For reasons described below, WGA disagrees with this assertion. The NPRM clearly qualifies for further review under Executive Order 13132, as its provisions would 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>6</sup>

### **States’ Legal Authority Over Water Resources**

Having developed over the course of decades to reflect local customs and necessities, state water laws – and the regulatory frameworks within which they operate – are significantly diverse.<sup>7</sup> Federal case law and statutory authority provide a clear history of deference to state primacy in water management and allocation decisions. The U.S. Supreme Court has

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<sup>3</sup> Available at: [http://www.westernstateswater.org/wp-content/uploads/2017/01/Darcy\\_USACE-Storage-Water-Letter\\_2013July.pdf](http://www.westernstateswater.org/wp-content/uploads/2017/01/Darcy_USACE-Storage-Water-Letter_2013July.pdf)

<sup>4</sup> 64 FR 43255, Aug. 10, 1999.

<sup>5</sup> 81 FR 91556, at 123, Dec. 16, 2016.

<sup>6</sup> 64 FR 43255, Aug. 10, 1999.

<sup>7</sup> *California v. United States*, 438 U.S. 645, 653 (1978).

consistently expressed that states established their sovereign authority over water resources upon their admission to the Union under the Equal Footing Doctrine<sup>8</sup> and continue to maintain such authority under their own legal structures.<sup>9</sup>

The Tenth Amendment of the U.S. Constitution ensures 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>10</sup> States, subsequent to their admission into the Union under equal footing, have not relinquished their sovereign powers to allocate and manage water resources. Rather, states – particularly in the western U.S. – have a rich history of comprehensive water regulation devised under their respective laws.

Unlike states’ plenary authority to regulate water and land-use generally, federal powers are limited to those which have been enumerated in the U.S. Constitution. No applicable federal laws purport to preempt, expressly or by implication, state water-management authority. Numerous federal statutes reiterate that states possess primary authority over water resources within their respective borders and that it is the intent of Congress to preserve and respect such authority.<sup>11</sup> The two federal statutes USACE intends to “clarify” through these rulemaking efforts expressly and unambiguously recognize state primacy. 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>12</sup>

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<sup>8</sup> *Pollard v. Hagan*, 44 U.S. 212 (1845).

<sup>9</sup> *Martin v. Lessee of Waddell*, 41 U.S. 367, at 410 (“[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>10</sup> U.S. Const. amend. X.

<sup>11</sup> See Mining Act of 1866, 43 U.S.C. § 661; Desert Land Act of 1877, 43 U.S.C. § 321; Clean Water Act, 33 U.S.C. § 1251(b); Reclamation Act of 1902, 43 U.S.C. § 383-8 (“Nothing in this Act shall be construed as affecting or intending 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...”).

<sup>12</sup> 43 U.S.C. § 701-1.

Similarly, in the Water Supply Act of 1958, Congress declared its intent, “to recognize the interests and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control, as herein authorized to preserve and protect to the fullest possible extent established and potential uses, for all purposes, of the waters of the Nation’s rivers....”<sup>13</sup> Although USACE cites congressional intent to justify certain provisions in the NPRM, no intent of Congress is more repeatedly and clearly expressed throughout the controlling statutes than the preservation of, and respect for, states’ authority to manage and allocate their water resources.

The NPRM pronounces that, “the Corps 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.”<sup>14</sup> The text of the NPRM is rife with references to the importance of state authority over water resource management and USACE’s intention to respect the same.<sup>15</sup> Western Governors, however, are concerned that certain provisions, as described within the NPRM, would substantially interfere with states’ sovereign authority to manage and allocate water resources and that the proposal exceeds USACE’s legal authority over state-managed water resources.

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

While the NPRM asks for comments on the proposed definition of “surplus waters,” Western Governors assert that there is only one legally legitimate definition: any attempt to define “surplus water” must exclude natural, historic flows from any quantification of waters subject to any USACE regulation.

For reasons stated above, states have primary authority to manage and allocate water resources within their respective borders. USACE does not claim, nor do the facts reflect, that any state has relinquished such authority under the Flood Control Act of 1944, the Water Supply Act of 1958, or any other federal statute. While USACE may have viable claims to some level of discretion over waters that are impounded in USACE reservoirs which would not have existed but for the construction of USACE projects (*i.e.*, truly “surplus waters”), Missouri River Basin states have never ceded any rights to the natural flows that existed prior to USACE projects.

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<sup>13</sup> 43 U.S.C. § 701-1

<sup>14</sup> 81 FR 91556, Dec. 16, 2016.

<sup>15</sup> See 81 FR 91556, *supra* note 1 (e.g., “The proposed rule is not intended to upset the balance between federal purposes and State prerogatives, or to assert greater federal control over water...”; “The operations of Corps projects for those purposes are not expected to interfere with the prerogatives of the States to allocate waters within their borders for consumptive use.”).

States' rights to these natural flows, as well as access to the waters within their borders, should not be denied through any agency rule or actions. Additionally, natural flows should be exempt from any monetary charges imposed for water storage within USACE reservoirs. Such waters would exist within the streambed in the absence of USACE reservoirs and, therefore, should not be subject to federal management or the imposition of fees.

USACE concedes that some portion of waters which have been defined as "surplus" in the NPRM would, in fact, exist without USACE 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>16</sup> It is, therefore, WGA's position that natural flows should be expressly and clearly exempted from any USACE rule which claims any degree of authority to manage and/or allocate "surplus water."

## **Conclusion**

Western Governors have a history of responsible and comprehensive water management within their states and of working with various federal agencies in furtherance of that duty. Through this letter, the WGA expresses its concerns to USACE regarding the NPRM, in its current form, for the following reasons:

- Western Governors believe that the NPRM does, in fact, have "Federalism" implications which trigger the expanded procedural rulemaking requirements of Executive Order 13132.
- As the primary authority over water management and allocation within their borders, states must not be required to relinquish any of their rights to natural flows of rivers which have been impounded by USACE or any other federal agencies.
- Legally, USACE 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.
- USACE should not deny access to divert and appropriate natural flows (*i.e.*, water which would have been available without the construction of USACE impoundments) in its

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<sup>16</sup> *Id.*

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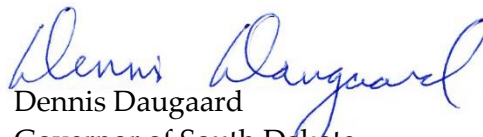
reservoir projects. Similarly, USACE should not charge storage fees to appropriators where such users are making withdrawals of natural flows within USACE reservoirs.

WGA strongly urges USACE to engage in meaningful and substantive consultation with Governors before moving forward with any rulemaking as described in the NPRM.

Sincerely,



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Governor of Montana  
Chair, WGA



Dennis Daugaard  
Governor of South Dakota  
Vice Chair, WGA