



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 10th and 14th 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



WESTERN STATES WATER COUNCIL

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August 6, 2013

Via Email: 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"¹ 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:

¹ *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....²

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...."³ 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.⁴

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 1902.⁵

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.

² 43 U.S.C. § 383.

³ 33 U.S.C. § 701-1 (emphasis added).

⁴ 43 U.S.C. § 390b.

⁵ *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.⁶ 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."⁷ 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."⁸ 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.

⁶ 33 U.S.C. § 708 (emphasis added).

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

⁸ 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....”⁹

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

⁹ 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....¹⁰

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.

¹⁰ 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



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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October 9, 2012

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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 10th and 14th 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 McCarren 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

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

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 (11th 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.

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.

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.

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 Dugaard

DD:nn

cc: Senator Tim Johnson
Senator John Thune
Representative Kristi Noem



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 (9th 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"

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.”

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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

U.S. Army Corp of Engineers

October 4, 2012

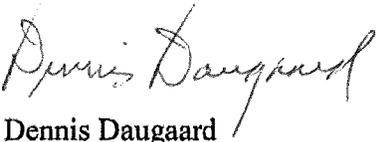
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Western states. They are the agency with experience in calculating fees for operations and maintenance, having done so for many Reclamation projects throughout the west. They routinely distinguish between natural flows and stored water available for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

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 want to thank the U.S. Army Corps of Engineers for coming to South Dakota to hear comments about how the draft surplus water studies will impact people who utilize the Missouri River reservoirs to meet their water needs. Our first comment is to request the 30 day comment period be extended for additional 60 days to provide adequate time for public input, given there are four reports to review.

The Corps' action to draft the surplus water reports raises a number of very serious concerns for South Dakota. The first concern is the Corps' disregard of individual state's rights to natural flows of the river. Natural flows are those flows that are in the river absent the reservoirs. 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 well-established state's right, long recognized by the federal government. Other federal agencies such as the U.S. Bureau of Reclamation recognize natural flows in the design, construction, and operation of their projects. The Corps is ignoring the very real existence of natural flows and a state's right to manage its own water resources. States should have jurisdiction and access to natural flows through their state water right programs without needing contracts from the Corps.

Our second concern is one of equity. It appears from the Corps draft reports that water supply contracts will only be required for those users who divert directly from the mainstem reservoirs. If the purpose of the contracts is truly to recover the cost of reservoir operation and maintenance, it would seem only fair that all authorized uses of the stored water, up and down the entire river, share in the expense. Many of the Corps' own studies have documented the tremendous benefits people throughout the basin enjoy by having controlled water supplies, such as for water intakes, cooling purposes, hydropower, and, of course, flood control. Requiring upstream states to pay the entire cost with people in the downstream states enjoying these benefits at no cost is not equitable.

Colonel Anthony C. Funkhouser
August 22, 2012
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A third concern relates to the Corps' assertion of control over all water in the Missouri River reservoirs. If the Corps has determined all water stored in the reservoirs is surplus water, this would allow the Corps to become the sole point of control of water used for current and future municipal and industrial use. Existing municipal and industrial water use in the reservoir reaches within South Dakota is less than the natural flow levels. Water supply from storage has not been and is not, in the foreseeable future, expected to be required to supplement these water supply needs. Therefore, the Corps has no jurisdiction or authority to charge fees for the water being drawn to meet those needs.

Please remember upstream states have already paid a heavy price for the Missouri River reservoirs. When the reservoirs filled, more than 500,000 acres of our most fertile river bottom lands were permanently flooded. Many citizens and tribal members were forced from their lands, homes, and communities. In return, the federal government promised South Dakota it would develop 950,000 acres for irrigation to help offset that loss. Today, only 25,000 acres have actually been developed - less than 3 percent of that promised. To impose all reservoir operation and maintenance costs on upstream states alone adds insult to that injury.

Thank you again for coming to South Dakota, and thank you for considering our request to extend the comment period.

Sincerely,

A handwritten signature in cursive script that reads "Dennis Daugaard". The signature is written in dark ink and is positioned above the printed name.

Dennis Daugaard

DD:nn