



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.¹

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

¹ 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,

A handwritten signature in blue ink, appearing to read "Jerry Rigby".

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

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,

A handwritten signature in black ink, appearing to read "Phillip C. Ward". The signature is stylized and cursive.

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