

NEBRASKA

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DEPT. OF NATURAL RESOURCES

May 15, 2017

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



Pete Ricketts, Governor

Docket Number: COE-2016-0016

Dear Sir/Madam,

The State of Nebraska appreciates the opportunity to comment upon the draft United States Army Corps of Engineers (USACE) proposed rules relating to projects for domestic, municipal and industrial water supply. Based upon our review, the State of Nebraska does not believe the USACE should go forward with these rules as written. Below are Nebraska's specific comments on the proposed rule.

States Must Be Consulted

As noted in the comments dated February 27, 2017, submitted to the USACE by the Western Governors' Association, the water right regulatory frameworks developed by the States are significantly diverse. Nebraska agrees with the Association that based on your proposal you are required to consult with the States. It is believed that it would be beneficial for the USACE and the States to meet in an informal setting to discuss the various state water laws so that all entities can better understand the needs and requirements that exist. Asking for comments does not meet the requirement of consultation.

State's Role in Granting Water Rights

The State of Nebraska has significant involvement with USACE reservoirs. There are 17 reservoirs in Nebraska in which the USACE has sought and obtained permits from the Nebraska Department of Natural Resources (NeDNR) for the construction and operation of those reservoirs. The USACE also holds three water right appropriations granted by NeDNR for storing water in three of those reservoirs. The other 14 reservoirs have storage appropriations held by other federal, state, and county government agencies with USACE still shown as the owner/operator of the dam. The USACE also has applied for and been granted by NeDNR three permits for diverting natural flow from Nebraska streams. (See attached table.) The US Bureau of Reclamation has obtained a permit for the construction and operation of the Harlan County Reservoir (one of the 17), which is owned by the USACE and jointly operated with the US Bureau of Reclamation.

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Additionally, Nebraska appropriators have state granted natural flow water rights to divert Missouri River stream flows from the area occupied by the Lewis and Clark Reservoir formed by the Gavins Point Dam on the Missouri River. The dam is located partially within Nebraska and partially within South Dakota. The state granted water rights are for various purposes including public or municipal water supply and irrigation. There are also water rights granted by NeDNR for natural flow rights out of the Missouri River from South Sioux City to Rulo, Nebraska.

As a consequence of the actions of the USACE in submitting to the State of Nebraska's regulatory authority over the use and distribution of surface water pursuant to state law, the USACE has acknowledged and acquiesced in the state's authority to manage the distribution of water stored in reservoirs. As noted in the federal register (page 91559), water rights are state granted and it is necessary to cooperate with the states to assure the state granted water rights are managed in accordance with state laws and the state constitutions.

In addition to maintaining the integrity of state granted water rights, the State of Nebraska is keenly interested in the maintenance of drinking water supplies, flood mitigation and industrial and agricultural uses related to the Missouri River. Along with the other basin states, Nebraska also has an interest in environmental, recreation and commercial operations dependent upon the Missouri River water supplies.

The State of Nebraska recognizes the interest that exists in seeking to clarify the basis for existing uses and affording the opportunity for increased uses not only in the Missouri River Basin but in all areas in which the USACE operates. The importance of not disrupting existing and historic uses is recognized. Certainly litigation has raised significant issues in various locations. However, federal regulations must be consistent with and supported by Congressional directives and not based simply upon the desire to make it easier to increase usage of storage facilities operated by the USACE.

The United States Supreme Court said in *California v. United States*, 438 U.S. 645, 678-9 (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, 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).

Definition of Surplus Water

In order to authorize easements and the withdrawal of natural flows of water that exist within the footprint of USACE reservoirs, the definition of surplus water has been warped to include natural flows. Legislative history is not cited to support the convoluted interpretation. Instead it is stated:

We believe that narrowly interpreting “surplus water” to enable the Corps to authorize only those withdrawals from its reservoirs that may be determined to utilize storage, as opposed to those withdrawals that could potentially have been accommodated from the natural flow of the river had the reservoir never been constructed, would frustrate Congress’ intent that the Corps should make surplus water available when doing so would not impair operations for authorized purposes or interfere with then existing lawful uses including the CWA, the ESA, and other federal statutes.

Federal Register p. 91565.

Essentially this quotation is saying that the interpretation is not supported by legislative history so it is not prohibited. Rather than reach the logical conclusion that Congress authorized the USACE to engage in contracts that utilize storage, the USACE has reached the unfounded conclusion that Congress authorized the USACE to include natural flows as well as stored water within its contracting authority. This interpretation is neither reasonable nor justified by the legislative history as cited. This is the type of overreach decried by Judge Neil Gorsuch, now a U. S. Supreme Court Judge, in his concurring opinion in *Gutierrez-Brizuela v. Lynch*, 834 F.3d. 1142 (10 Cir. 2016). In his critique of case law allowing excessive deference to administrative rule making, he says: “. . . [case law] permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers’ design.” *Id.* at 1149. One reason such case law has been followed is the challenge of addressing the need for legislative action. He notes:

When the political branches disagree with a judicial interpretation of existing law, the Constitution prescribes the appropriate remedial process. It’s called legislation. Admittedly, the legislative process can be an arduous one. But that’s no bug in the constitutional design: it is the very point of the design.

Id. at 1151.

The point is, that if the USACE wants to subject natural flows to its authority within the footprint of its reservoirs, then it needs Congress to grant that authority. Achieving such a result through the

tortured definition of “surplus water” is neither justified nor a reasonable interpretation of those words.

Rather than attempt to bring natural flows within the definition of surplus water, it would seem that recognizing that the granting of an easement to authorize access for the withdrawal of natural flow is different than entering into a contract for the use of storage water that is surplus to existing uses. Recognizing the difference is critical to the determination of the analysis that would not have to occur for a natural flow easement in contrast to the determination of whether or not surplus water exists for the use of stored water.

Definition of Domestic and Industrial Uses

The proposed definition of “domestic and industrial uses” under Section 6 of the 1944 Flood Control Act is also not reasonable and not supported by the legislative history. The proposed definition is that all uses except those explicitly assigned to the Bureau of Reclamation through 43 USC 390 are included in “domestic and industrial uses.” In effect this expansive definition has no boundary or limitation. The justification for the definition is the assertion that if Congress gave the USACE authority to contract for surplus water that must mean for any purpose in spite of the use of the words “domestic and industrial” rather than “for any purpose.” Despite the use of the specific words “domestic and industrial uses,” the USACE seeks to write those words out of the definition and assert the authority to contract for the use of water for all purposes.

Although it might be convenient for the USACE to engage in such expansive definition and thereby enter into contracts for all sorts of purposes, Congress limited USACE contracts to those for domestic and industrial uses. Under the proposed definition “domestic and industrial uses” could include instream flows or other environmental purposes. Although such uses may be worthwhile and certainly a part of most state laws, they are not domestic and industrial uses. While other examples could be given, the point is that it is not reasonable to include all uses in “domestic and industrial uses” or else those words have no meaning. If Congress had intended to allow “all uses” it could have said so, but it did not.

Storage May be Included

Within the context of the Water Supply Act of 1958, it is acknowledged that water supply may be added as a purpose for a reservoir project previously constructed. In providing guidance on how such addition is to occur, the USACE states:

The proposed definition of the statutory phrase ‘storage may be included’ for water supply makes clear that the Corps’ role under the WSA is limited to making storage available in its reservoir projects, not constructing or operating water treatment or delivery systems, or obtaining water rights or permits on behalf of water supply users. It remains the responsibility of the water supply users to withdraw, treat, and deliver water from a Corps reservoir to end users, and to obtain whatever water rights may be required under State law.

This interpretation inherently is flawed for several reasons. First, end users certainly must comply with state laws that require them to obtain water rights. Without such permits states would not

be able to assure that the water supply obtained through the USACE contract under the WSA could be protected and delivered to its point of use. Such water rights are critical to the functioning of the state created water rights complex system of administration that in some cases developed in the 1800's. However, the "end users" may not be able to obtain the required water rights if the USACE itself does not have the prerequisite water right to store water for the later beneficial use of stored water.

Thus the second flaw in the USACE interpretation is its failure to recognize that by embarking on becoming a water supplier by adding water supply to a previously authorized project that did not include water supply as an authorized purpose initially, the USACE now becomes subject to State water right requirements. The USACE is granted the exemption of submission to state regulatory authority when it engages in flood control and navigation projects. However both the WSA and the 1944 Flood Control Act specify that for purposes of developing water supplies and rights in water utilization and control, Congressional policy is that the Federal Government is to ". . . participate and cooperate with States..." and ". . . 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. . . ." (See 43 USC §390b(a), i.e. the WSA and 33 USC §701-1, i.e. the 1944 Flood Control Act). Thus once the USACE decides to engage in providing water supply the USACE must first obtain whatever permits are required by the States for purposes of regulating and allocating water supply under their various water right systems. Upon doing so, then those who wish to contract with the USACE are able to do so within the water right system that exists within the state in which the contractor wishes to use the water.

Lack of Definitive Standards for Determination of Inclusion of Water Supply Storage

The draft rule proposes abandoning the 15 percent or 50,000 acre-foot threshold standard for determination of "serious" effects or "major" changes presently in use under the WSA for the purpose of deciding whether or not to include water supply storage in a previously existing reservoir. In evaluating what constitutes a "major structural or operational change," or a

"serious" effect upon an authorized purpose, the USACE proposes to jettison the current clear and understandable standard and move to a case by case determination made exclusively by the USACE as it interprets Congressional intent for a particular reservoir project. Thus the proposal is to go to essentially no standard which would leave determinations entirely to the discretion of the USACE and limit review of its determinations. The proposal is no improvement or clarification to the existing standard that provides a modicum of certainty to everyone who might have an interest in a proposal to modify a project to include a storage water supply from a USACE facility.

Water Supply Uses of the USACE's Reservoirs on the Missouri River cannot be Administered under the Authority of the 1958 Water Supply Act at This Time

Except for the 16.3 million acre-feet space allocated for flood control, there has been no allocation among the other seven congressionally authorized purposes including hydropower, water supply, water quality control, recreation, navigation, irrigation, and fish & wildlife. Thus at this time no determination can be made regarding the amount of surplus storage available to be contracted under a water supply agreement. Additionally the flood control storage should not be re-allocated for other uses because flood control remains a continuing unmet need. Moreover

flood control is Nebraska's top concern and flood control should be USACE's primary purpose for operating Missouri River mainstem dams.

Reasonable Price for Surplus Water Contracts under Section 6 Should NOT Include the Revenues Forgone of Hydropower

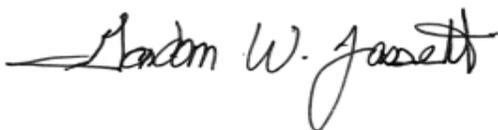
On page 91560, "... at projects with a hydropower purpose, under the proposed rule, the USACE would coordinate surplus water determinations in advance with the applicable federal Power Marketing Administration (PMA), and utilize in its determinations any information that the PMA provided regarding revenues and benefits foregone." Because the USACE is not permanently reallocating storage to water supply when making surplus water available, the USACE is not choosing to use storage to provide surplus water at the expense of congressionally authorized project purposes. Therefore the "surplus water" was never allocated for hydropower and there is no basis to determine foregone hydropower revenues. Consequently, foregone hydropower revenues should not be included in the cost to surplus water contract holders.

All Surplus Water Agreements' Effects on the Congressionally Authorized Purposes Shall be Assessed when the USACE Prepares Surplus Water Reports, Pursuant to the National Environmental Policy Act (NEPA)

Before the USACE finalizes the proposed rule and issues surplus water agreements, the USACE is required to determine the quantity of surplus water available in its reservoirs and if the water use agreements will have no significant effects on the reservoir's authorized purposes. In the previous surplus water report and draft reports for Missouri River reservoirs, the USACE only evaluated the new water use agreements' impacts on the congressionally authorized purposes. The cumulative effects of all existing water uses and the proposed new uses from the reservoirs will need to be assessed in future surplus water studies.

I strongly urge USACE to engage in substantive consultation with the states and welcome an opportunity to discuss our comments before the USACE moves forward with the proposed water supply rulemaking.

Sincerely,



Director
Nebraska Department of Natural Resources

Attachment



U.S. Army Corps of Engineers (USACE) Owned Reservoirs and Water Rights in Nebraska

Dam Name	Dam Owner	Appr. No.	Water Right Holder	Stream
SALT CREEK 12 - CONESTOGA	USACE	A-10121	NE Game & Parks Co.	HOLMES CREEK
SALT CREEK 8 - WAGON TRAIN	USACE	A-10024	NE Game & Parks Co.	HICKMAN BR SALT CREEK
SALT CREEK 14 - PAWNEE	USACE	A-10176	NE Game & Parks Co.	N BR MIDDLE CREEK
SALT CREEK 10 - YANKEE HILL	USACE	A-10430	NE Game & Parks Co.	CARDWELL BR SALT CREEK
SALT CREEK 9 - STAGECOACH	USACE	A-10119	NE Game & Parks Co.	HICKMAN BR SALT CREEK
SALT CREEK 13 - TWIN LAKES	USACE	A-10308	NE Game & Parks Co.	S BR MIDDLE CREEK
SALT CREEK 17 - ANTELOPE CREEK (HOLMES LAKE)	USACE	A-9972	USACE	ANTELOPE CREEK
SALT CREEK 2 - OLIVE CREEK	USACE	A-10120	NE Game & Parks Co.	OLIVE CREEK
SALT CREEK 18 - BRANCHED OAK	USACE	A-10309	NE Game & Parks Co.	OAK CREEK
SALT CREEK 4 - BLUESTEM	USACE	A-10025	NE Game & Parks Co.	OLIVE BR SALT CREEK
PAPIO CREEK 16 - STANDING BEAR	USACE	A-12644	Douglas County	TR-PAPIO CREEK
PAPIO CREEK 11 - CUNNINGHAM	USACE	A-12909	Douglas County	LITTLE PAPIO CREEK
PAPIO CREEK 20 - WEHRSPANN	USACE	A-16141	USACE	TR-S BR PAPIO CREEK
PAPIO CREEK 18 - ZORINSKY	USACE	A-16182	USACE	BOX ELDER CREEK
PAPIO CREEK D-4	USACE	A-16257	Papio-Missouri River NRD	TR-LITTLE PAPIO CREEK
HARLAN COUNTY DAM	USACE	A-4190	USBR	REPUBLICAN RIVER
WEHRSPANN WETLAND	USACE	A-17800	Papio-Missouri River NRD	TR-S BR PAPIO CREEK
Irrigation of land by surface water		A-2948	USACE	Prairie Dog Creek
Irrigation of land by surface water		A-8574	USACE	OAK CREEK
Irrigation of land by surface water		A-10442	USACE	OAK CREEK