



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

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.

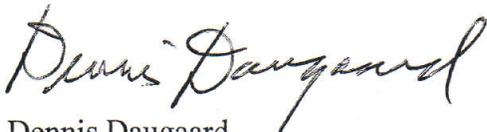
In chapter 3 of each of the five reports at issue, the construction costs for each of the reservoirs were calculated; however, some specific costs were excluded from the calculations based on use. Since the authorizing legislation exempted reimbursement for certain uses such as flood control, the surplus 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 Daugaard

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cc: Senator Tim Johnson
Senator John Thune
Representative Kristi Noem