



**DEPARTMENT of ENVIRONMENT  
and NATURAL RESOURCES**

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Ada Benavides, Senior Policy Advisor  
U.S. Army Corps of Engineers  
Planning and Policy Division  
Room 3F86  
441 G Street NW  
Washington, DC 20314-1000

Dear Ms. Benavides:

This letter is in response to the Assistant Secretary of the Army for Civil Works (ASA) solicitation for comments on implementation guidance for various provisions of the Water Resources Development Acts of 2018 (WRDA 2018) and 2016 (WRDA 2016), and the Water Resources Reform and Development Act of 2014 (WRRDA 2014). We thank the Assistant Secretary of the Army for Civil Works for allowing the South Dakota Department of Environment and Natural Resources to provide written comments on the guidance for various provisions of WRDA 2018, WRDA 2016, and WRRDA 2014.

**WRDA 2018, Section 1121: Upper Missouri Mainstem Reservoir Water Withdrawal Intake Easement Review**

This section directs the U.S. Army Corps of Engineers (Corps) to expedite, over the next ten years, the review of applications for easements necessary to access federal land under the control of the Corps for the placement of water withdrawal intakes in the Upper Missouri Mainstem Reservoirs. It states the Corps, to the maximum extent practicable, shall decide on an easement application within 120 days.

When the Corps issued Real Estate Policy Guidance Letter No. 26 on June 10, 2008, this action effectively placed a moratorium on water development from the Missouri River within South Dakota. The policy stipulated that no easement will be granted until a water supply agreement is executed. Unfortunately the Corps had no process in place, at that time, to enter into a water supply agreement within South Dakota and there still is no process in place to meet this requirement. We recommend Real Estate Policy Guidance Letter No. 26 be rescinded until there is a process established to implement its policy.

**WRDA 2018, Section 1138: Surplus Water Contracts and Water Storage Agreements**

This section amends Section 1046(c) of WRRDA 2014, prohibiting the Corps from charging a fee for 10 years for a surplus water contract entered pursuant to Section 6 of the 1944 Flood Control Act if the contract is for surplus water stored in the Upper Missouri Mainstem reservoirs. Provision 1138 of WRDA 2018 adds that the Corps shall not assess a water storage fee with

respect to any water storage in the Upper Missouri Mainstem Reservoirs. This provision also extends the duration of the fee prohibition from 10 to 12 years.


As we stated under the comments for Section 1121 of WRDA 2018, the issuance of Real Estate Policy Guidance Letter No. 26 in 2008 and its restriction that no easement will be granted until a water supply agreement is in place effectively placed a moratorium on water development from the Missouri River within South Dakota. And for the same reason stated earlier, we recommend Real Estate Policy Guidance Letter No. 26 be rescinded until there is a process established to implement its policy.

A specific concern we have with the Corps implementing a nationwide water supply rule and requiring surplus or reallocated water contracts for users of the natural flow of Missouri River are that these actions assert federal authority over all water within Corps reservoir boundaries. The proposed actions wrongly assume 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 and regulating the use of the natural flows of the Missouri River should rest solely under the jurisdiction of the State of South Dakota.

In particular, such an assertion infringes upon our state's water management activities and our water laws governing water storage and use rights. Moreover, we reiterate that the Corps does not have authority to preempt state water laws related to water supply or water rights. Existing law and policy clearly establish that water supply and water rights are state and local issues.

Thank you again for allowing us to provide written comments concerning guidance implementation for various provisions of WRDA 2018, WRDA 2016 and WRRDA 2014.

Sincerely,



Steven M. Pirner, P.E.  
Secretary

cc: Senator M. Michael Rounds  
Senator John Thune  
Representative Dusty Johnson  
Attorney General Jason Ravnsborg  
Secretary Kelly Hepler, SD Department of Game, Fish & Parks  
Secretary Kim Vanneman, SD Department of Agriculture  
Jason Simmons, Policy Advisor for Governor Noem