



STATE OF SOUTH DAKOTA
DENNIS DAUGAARD, GOVERNOR

May 2, 2014

The Honorable Tim Johnson
United States Senate
Washington, DC 20510

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The Honorable John Thune
United States Senate
Washington, DC 20510

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The Honorable Kristi Noem
United States House of Representatives
Washington, DC 20515

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Dear Senator Johnson, Senator Thune, and Representative Noem:

I have previously sent you copies of my correspondence to the U.S. Army Corps of Engineers regarding my objections to the Missouri River Reallocation Study (dated October 4, 2012) and the Missouri River Surplus Water Studies (dated October 9, 2012). I regret that none of my objections have deterred the Corps from proceeding. Therefore, I am writing in hopes you might find a mechanism in Congress to end the Corps' march toward usurping South Dakota's water rights.

The Corps is pursuing three courses in their water marketing efforts:

1. the Surplus Water Reports for each of the mainstem reservoirs;
2. the Reallocation Study for the mainstem reservoir system; and
3. the Corps' rulemaking effort with respect to both 1 and 2.

The Corps made a similar effort to charge for storage from the reservoirs in the 1980s. There was significant disagreement between the states and the Corps specific to both potential water contracts and recognition of natural flows, which led to Congressional involvement. The effort went into hibernation for 20 plus years until 2008 when the Corps issued Real Estate Policy Guidance Letter No. 26 which led to the current attempt to market water. Based on that guidance, the Corps announced in early 2010 a new policy that prohibits new water withdrawals from the Missouri River reservoirs for municipal and industrial uses until the users first obtain a storage contract with the Corps. The Corps implements this prohibition by not issuing access easements to reach water stored in the reservoirs.

The Corps claims their authority to proceed in this effort falls under Section 6 of the 1944 Flood Control Act and the surplus water provisions in the 1958 Water Supply Act. There is no dispute that Section 6 of the 1944 Act allows the Corps to sell surplus water; the crux of this dispute hinges on what is meant by surplus water. Albeit a hotly contested topic during the congressional hearings on the 1944 Flood Control Act, no definition of surplus water was ever established by Congress.

Reallocation of the storage in the mainstem reservoirs requires a full analysis of the entire Missouri River system. Because that is a lengthy process, the Corps recognized the need to provide a short term mechanism to allow potential water users access to water from the reservoirs. Thus, under Section 6 of the 1944 Flood Control Act, the Corps drafted six water surplus reports, one for each of the mainstem reservoirs. Each report identified an amount of water available for temporary use and the cost associated with using water from that particular reservoir. The Corps stated temporary contracts for using stored water would be issued for a period of five years with an option of extending the temporary contract for an additional five years. This would allow the Corps sufficient time to complete a full reallocation study of the mainstem system and identify water in storage that can be reallocated to municipal and industrial use.

Only one of the surplus water reports is finalized and issued; the other five reports remain in draft status. The report issued in July 2012 is for the Garrison Reservoir. The need to expedite this report was the large demand for industrial use water for fracking oil wells in western North Dakota. The Corps took public comments on the remaining five draft reports and sent the final drafts to Assistant Secretary of the Army Darcy for final review in May 2013. The Assistant Secretary was expected to make the final decision on these reports in July 2013, but there has not yet been any action.

In 2012, the Corps started the second effort by initiating a long term reallocation study of municipal and industrial uses. They held scoping meetings to take public comments, which resulted in my initial objections submitted by letter dated October 4, 2012. The Corps also contacted the states, tribes, and federal agencies to form a Cooperating Agency Team to help in the reallocation effort. A normal Cooperating Agency Team process involves drafting the study with team members providing technical assistance to the Corps and a perspective unique to each state, tribe, or agency represented. However, in this effort, the Corps solicited little assistance from the Cooperating Agency Team members. The extent of the Corps' engagement of the Team was as follows. They hosted a kickoff meeting of the Cooperating Agency Team in Yankton in July 2013 to inform the members of the process and time schedule, and held a final Cooperating Agency Team meeting in Kansas City in January 2014 informing the team of the tentative results of the draft study. No assistance from the Cooperating Agency Team was requested by the Corps between the kickoff and final meetings. At the final meeting, the Team members were told they would not be allowed to review a draft of the study prior to it being sent to Corps headquarters for internal review. The Corps told the Team members their first opportunity to review the study will occur after it is released for public comment, tentatively scheduled for July 2014. Obviously, this has not been a cooperative effort by any stretch of the imagination.

The Corps' third effort toward water marketing has involved the rulemaking process. Initially, the rulemaking effort was targeted at setting the cost schedules for using stored water as per the surplus water reports. The draft studies listed projected pricing from a low of \$17 per acre-foot of water from the Oahe Reservoir to a high of \$175 per acre-foot of water from Gavins Point Reservoir. It should be noted that no downstream users of Missouri River water would pay for any benefits they receive. In May 2012, Assistant Secretary of the Army Darcy, in a memorandum regarding the Lake Sakakawea Surplus Water Report, indicated the Corps rulemaking would immediately begin by setting the cost and policies for use of water stored in

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the Missouri River reservoirs. However, that did not happen. At the kickoff meeting of the Cooperating Agency Team in 2013, the Corps' rulemaking effort was discussed and the Corps indicated they may be expanding the scope of the effort, but no specifics were given. While the Corps has not publicly announced they have started the rulemaking process, the Western States Water Council in an August 6, 2013, letter calls on the Corps to recognize and defer to the states' legal right to allocate, develop, use, control, and distribute their surface waters to include natural flows of the Missouri River.

The Corps' march toward control over all Missouri River water stored in the reservoirs, if left unchecked, will allow the Corps:

- to control management of all water stored in the reservoirs for current and future municipal and industrial use;
- to usurp the authority of states to manage their own water supplies for the benefit of their citizens - a state's right, long recognized by Congress and the federal government; and
- to usurp the state's right to jurisdiction, access, and use of natural flows in the Missouri River system.

Existing uses from the Missouri River in South Dakota are less than the natural flows, so the Corps has no jurisdiction or authority to charge for water used in South Dakota. The Corps is choosing to ignore both the state's right to natural flows of the Missouri River and Section 1 of the 1944 Flood Control Act, also known as the O'Mahoney-Milliken Amendment. Both a plain meaning and a historical perspective leave little doubt that the purpose of the O'Mahoney-Milliken amendment was to guarantee to the states the right to allocate waters within their boundaries without regard to the impact of such allocation on navigation. Simply put, the three efforts listed above are a hostile takeover of the state's water and authority to allocate Missouri River water. The Corps has said the outcome of the Missouri River studies will be their model for use nationwide. I am asking for your help to stop the Corps in all three of their efforts, not only here, but nationally. Thank you.

Sincerely,



Dennis Daugaard

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