

Testimony of Steven Pirner, PE  
Secretary, South Dakota Department of Environment and Natural Resources  
to the  
US Senate Subcommittee on Superfund, Waste Management and Regulatory Oversight

**“Five Years from the Flood: Oversight of the Army Corps’ Management of the Missouri River and Suggestions for Improvement”**

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North Sioux City, South Dakota

Chairman Rounds, Ranking Member Markey, and Members of the Committee, my name is Steve Pirner, Secretary of the South Dakota Department of Environment and Natural Resources (DENR). We learned a lot about the Missouri River and flooding in 2011, but now it is time to look forward and solve other problems. I want to share with you our perspectives on the Surplus Water Reports and Reallocation Studies proposed by the Army Corps of Engineers (Corps) for the Missouri River reservoirs and offer suggestions for improvement.

To put our issues with these studies into context, remember our people and Tribes paid a heavy price for the four dams in South Dakota. These reservoirs permanently flooded more than 500,000 acres of our most fertile river bottomlands. Many citizens and tribal members were forced from their lands, their homes, and their communities. The promise of federal irrigation projects to help offset those losses never materialized.

Then another payment was extracted from us in 2008 when the Corps issued Real Estate Guidance Policy Letter No. 26. This policy requires municipal and industrial water users to acquire a water storage contract prior to the Corps issuing an access easement to a Missouri River reservoir for a pump site, but the Corps had no process for issuing the contracts. Therefore, the effect of the policy was to place a moratorium on easements to the Missouri River reservoirs.

This moratorium hit South Dakota hard; out of a thousand miles of Missouri River shoreline, only about 100 miles are on the two short free-flowing stretches in the state. Therefore, 90 percent of our shoreline became off limits to potential users of Missouri River water. Midland Contracting was one of the first to find this out when the Corps told them they could no longer pump water used for dust control out of Lake Sharpe. The most vivid example was the Corps refusing to let another contractor pump water during the 2011 flood.

To develop a process for Policy Letter No. 26, the Corps began Surplus Water and Reallocation Studies under the authority of Section 6 of the 1944 Flood Control Act and the surplus water provisions in the 1958 Water Supply Act. We do not dispute the Corps has authorities under those Acts, but we strongly dispute the Corps' resulting definition of stored water as being all the water within the reservoir boundaries. This new definition, should it go unchallenged, creates a monumental change to the law and would defeat states' rights to natural flows that by tradition and law are under the jurisdiction of the states. To better understand natural flows, visualize the reservoirs of stored water sitting on top of a river with natural flow passing underneath; this natural flow represents water under the jurisdiction of the state.

States' rights to natural flows of navigable waters within their borders are constitutionally founded, and protected, in the Equal Footing Doctrine. Congress acknowledged this states' right in the first sentence of Section 1 of the 1944 Flood Control Act by stating *"...it is declared to be 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,..."* As a consequence of the doctrine and the enacted law, the Corps must acknowledge the state's right to natural flows. Its definition of stored water indicates it intends to do the opposite.

Another concern with the Corps' studies is one of equity. The Corps has documented the tremendous benefits the reservoirs supply to people throughout the basin – controlled water supplies, hydropower, and flood control. Now to require just the

upstream states to pay the cost through stored water fees with people in the downstream states enjoying these benefits at no cost is not fair or equitable. As Governor Daugaard wrote to the Corps in 2012, *“To impose all reservoir operation and maintenance costs on upstream states alone adds insult to (that) injury.”*

To resolve these issues, South Dakota suggests Congress take the following actions:

1. Reiterate that natural flows through the reservoirs exist and those flows remain under the jurisdiction of the states;
2. Make permanent the 10-year waiver in the 2014 Water Resources Recovery and Development Act on water charges for contracted surplus water; and
3. Lift the moratorium on pump access easements by rescinding the Corps' Real Estate Guidance Policy Letter No. 26 and allow users who have obtained state water rights to pump water without interference from the Corps.

I hope this information is useful to the Subcommittee. Thank you again for the invitation.