

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

**“Oversight of the Army Corps’ Regulation of Surplus Water and
the Role of States’ Rights”**

June 13, 2018
Washington, D.C.

Chairman Rounds, Ranking Member Booker, and Members of the Committee, my name is Steve Pirner, Secretary of the South Dakota Department of Environment and Natural Resources (DENR). You all have heard about the Waters of the U.S. rule proposed by the U.S. Environmental Protection Agency (EPA). Many labeled that rule as the largest federal takeover of our nation’s water resources ever attempted. However, the Water Supply Rule proposed by the U.S. Army Corps of Engineers (Corps) for the Missouri River reservoirs exceeds that federal takeover action, at least in South Dakota.

The Missouri River is the largest, most reliable surface water supply in South Dakota. As such, it is extremely important to the state. In the 1950s and 60s, the federal government built four massive dams in South Dakota on the Missouri River, but we paid a heavy price. Environmentally, these reservoirs flooded more than 500,000 acres of our most fertile river bottomlands, never to be seen again. Socially, the dams disrupted people, forcing citizens and tribal members from their lands, homes, and communities. The promise of federal irrigation projects to help offset those losses never materialized.

The proposed Water Supply Rule began in 2008 when the Assistant Secretary of the Army 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 reservoirs.

To advance the process, the Corps developed the proposed Water Supply Rule. Under the rule, the Corps defines stored water as being all the water in the reservoirs. This new definition creates a monumental change to the law and steals South Dakota's 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,..."* No other federal law usurps this policy. As a consequence of the doctrine and the enacted law, the Corps must acknowledge the state's right to natural flows, but its definition of stored water does the opposite.

Another concern with the Corps' rule is one of equity. The Corps has documented the tremendous benefits the reservoirs supply to people throughout the basin, yet in the rule the Corps applies fees to just the upstream states. To require 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."*

Taken together, the moratorium on easement access and proposed Water Supply Rule has deprived South Dakota of its Missouri River water because out of a thousand miles of Missouri River shoreline, only about one hundred miles are on the two short free-flowing stretches in the state. Therefore, ninety percent of our shoreline is 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 the lake behind Big Bend Dam. The amount of water to be used from this reservoir that is 80 miles long and covers 63,000 acres was miniscule at best. The Corps has held fast to this moratorium, refusing to let a contractor pump water in 2011 even while flood waters were devastating Pierre, Ft. Pierre, and downstream communities. The city of Pierre has been denied access for several years to the river to install a small pumping station that would allow the city to irrigate green space with river water, saving time and money. This moratorium remains in place today, as evidenced by the Corps' response to our issuance of a temporary water right permit to a contractor on March 19, 2018, to use 90,000 gallons of Missouri River water out of the Oahe Reservoir to redo a state parking lot just above Oahe Dam. Oahe holds 6.4 trillion gallons. The Corps' response to this [use of 0.000001 percent of Oahe water](#) was, *"All requests for using water from the South Dakota reservoirs are on hold until finalized guidance is received from Headquarters. An alternate source of water should be utilized."* All of these actions by the Corps denying use of water already approved by the state are nonsensical at best.

More detailed objections to the proposed rulemaking have been submitted by Governor Dugaard, and I have enclosed copies of his letters for your information. However, the bottom line is the Corps is attempting a federal takeover of the Missouri River water in South Dakota. This 2008 rulemaking effort tramples state's rights and needs to be stopped now before the Corps finalizes the rule in September. The future of South Dakota is linked directly to having a Missouri River water supply we can manage. Please do not let the Corps take that away from us. We ask for your help in stopping the rulemaking in the name of the Constitutional Equal Footing Doctrine, cooperative federalism, and protecting state's rights under the 1944 Flood Control Act.

Thank you again for the invitation.

Enclosed: Letters from Governor Dennis Dugaard