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Oversight of the Army Corps' Regulation of Surplus Water and the Role of States' Rights

Chair Rounds, Ranking Member Booker, and Members of the Subcommittee, I appreciate the opportunity to testify today on behalf of the Western Governors' Association (WGA). My name is Ward Scott and I am a Policy Advisor with the Association, where my work focuses on western water policy and state-federal relations.

WGA represents the Governors of 19 western states and three U.S. territories and is an instrument of the Governors for bipartisan policy development, information-sharing, and collective action on issues of critical importance to the western United States. The elected and appointed officials of the western states have a long history of responsible land and water resource management and of working collaboratively with the administrative agencies of the federal government.

My testimony will focus on the Western Governors' concerns with the U.S. Army Corps of Engineers (Corps) proposed rule, "Use of [Corps] Reservoir Projects for Domestic Municipal & Industrial Water Supply" (Proposed Rule).[1] Western Governors have consistently expressed their opposition to the Proposed Rule and to any agency rule or policy that would – or has the potential to – interfere with, subordinate, or in any way diminish states' well-established legal authority over water resources within their boundaries.

Western Governors' concerns regarding the Proposed Rule focus on three primary elements. First, the Proposed Rule may have preemptive effects on states' sovereign authority over water resources and corresponding state laws. Second, the Corps' overly-broad proposed definition of the term "surplus waters" includes natural, historic river flows, which should remain under state jurisdiction. Third, the Corps' has not adequately consulted with potentially-affected states, nor has it properly assessed potential federalism implications as required by Executive Order 13132, in its development of the Proposed Rule.[2]

Water is precious everywhere but especially in the West, where consistently arid conditions, diverse landscapes and ecosystems, and growing populations present unique challenges in the allocation and management of scarce water resources. State water laws have developed over the course of decades, and vary greatly to account for local hydrology, the interplay between Tribal, state, and federal legal rights, and complicated systems of water allocation. In the West, water must generally be appropriated under state-granted water rights and is often transferred long distances from its point of diversion to its point of use. Additionally, western water users often possess vested private property rights in water, which are granted and administered by the states. Western

[1] 81 Fed. Reg. 91556 (Dec. 16, 2016).
[2] WGA Comments, Feb. 27, 2017. Available at:
http://westgov.org/images/editor/USACE_Surplus_Waters_Rule_-_final.pdf.

state water laws – and the regulatory frameworks within which they operate – are complex and diverse and must be accounted for in the development of any Corps rule or policy.

State Authority over Water Resource Management and Allocation

Western Governors have adopted policy (WGA Policy Resolution 2015-08, Water Resource Management in the West) that articulates a fundamental principle recognized by both Congress and the United States Supreme Court:

> States are the primary authority for allocating, administering, protecting, and developing water resources, and they are primarily responsible for water supply planning within their boundaries. States have the ultimate say in the management of their water resources and are best suited to speak to the unique nature of western water law and hydrology.[3]

This well-established state authority is rooted in the U.S. Constitution's Tenth Amendment, which guarantees that, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[4] States, upon their admission to the Union, established their sovereign authority over water resources under the Equal Footing Doctrine[5] and continue to maintain this broad authority, unless preempted by federal law.[6] Federal statutes addressing western water management have consistently expressed that states possess primary authority over their water resources and that it is the intent of Congress to preserve and respect such authority and corresponding state laws.[7]

No federal laws cited by the Corps that may be applicable to Proposed Rule expressly or impliedly preempt state's authority to manage and allocate water resources. Rather, the two federal statutes relied upon by the Corps in its Notice of Proposed Rulemaking (NPRM)[8] – the Flood Control Act of 1944 and the Water Supply Act of 1958 – clearly recognize and defer to state law.

Section 1 of the Flood Control Act of 1944 begins with the following: "[I]t is hereby 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…"[9] Similarly, in the Water Supply Act of 1958, Congress declared its intent "to recognize the primary responsibilities of the States and local interests in developing water supplies for domestic, municipal, industrial, and other purposes and that the Federal Government should participate and cooperate with States and local interests in developing such water supplies

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[3] WGA Policy Resolution 2015-08, Water Resource Management in the West. Available at: http://westgov.org/images/editor/RESO_Water_Resources_Final_Version_08.pdf

[4] U.S. Const. amend. X.

[5] *Pollard v. Hagan*, 44 U.S. 212 (1845).

[6] *Martin v. Lessee of Waddell*, 41 U.S. 367, at 410 (1842) ("[T]he people of each state became themselves sovereign; and in that character hold the absolute right to all of their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government."); *see also*, *Kansas v. Colorado*, 206 U.S. 46 (1907); *California Oregon Power v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935); *PPL Montana v. Montana*, 565 U.S. 576 (2012).

[7] *See*, *e.g.*, the 1866 Mining Act (43 U.S.C. § 661); the 1877 Desert Land Act (43 U.S.C. §321); the 1920 Federal Power Act (16 U.S.C. §§ 802, 821); the Clean Water Act (33 U.S.C. § 1251(b) and (g)); the 1902 Reclamation Act (43 U.S.C. § 383); *Pollard v. Hagan*, 44 U.S. 212 (1845); *California v. United States*, 438 U.S. 645 (1978).

[8] 81 Fed. Reg. 91556 (Dec. 16, 2016).

[9] 43 U.S.C. § 701-1.

in connection with the construction, maintenance, and operations of Federal navigation, flood control, irrigation, or municipal purpose projects."[10] Although the Corps cites various statements of Congressional intent to justify certain provisions of the Proposed Rule in its NPRM, no intent of Congress is more repeatedly and clearly expressed throughout the controlling statutes than the preservation of, and respect for, states' authority over their water resources.

The Corps' Proposed Rule

Through its Proposed Rule, the Corps seeks to establish policies governing the use of its reservoir projects within the Upper Missouri River Basin and the treatment of "surplus water" within that system.[11] Although the Proposed Rule attempts to address "specific issues that have arisen most notably in the Corps' Northwestern and South Atlantic Divisions," the Corps has stated that it "is also intended to provide greater clarity, consistency, and efficiency in implementing [the Flood Control Act of 1944 and the Water Supply Act of 1958] nationwide."[12]

Western Governors have expressed their concerns regarding both the substance of the Proposed Rule and the process by which is was developed, both through WGA and individually[13] and remain concerned that the procedural, legal, and technical issues cited in comments and letters, as well as the views and concerns expressed by individual states, have still not been addressed by the Corps or incorporated into its decisionmaking processes. These concerns were heightened by the Corps' listing of the Proposed Rule in the Spring 2018 Unified Agenda of Regulatory and Deregulatory Actions' as currently in its "Final Rule Stage" with a "Final Action" date estimated as January 2019.

Definition and Treatment of "Surplus Waters"

Through the Proposed Rule, the Corps seeks to address the use of its reservoir projects for domestic, municipal, and industrial water supply, and clarify its use of water supply contracts to authorize the withdrawal of "surplus waters" from Corps reservoirs. The Corps' administration of water supply contracts at its reservoirs should not have any negative effect on states' primary authority over the management and allocation of their water resources or state laws enacted for such purposes. The Proposed Rule, however, fails to distinguish between "surplus water," which is defined in relation to storage and authorized purposes, and "natural flows," which is defined as waters that would have been available for use in the absence of federal dams and reservoirs.

Section 6 of the Flood Control Act of 1944 authorizes the Corps to enter into agreements "for domestic and industrial uses of surplus water that may be available at any [Corps] reservoir," provided such uses do not "adversely affect then-existing lawful uses of such water." The statute does not provide a definition for "surplus waters." Under the Proposed Rule, the Corps would define "surplus water" to mean any water available at a Corps reservoir that is not required during a specified time period to accomplish an authorized purpose or purposes of that reservoir.

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[10] 43 U.S.C. § 390b.
[11] 81 Fed. Reg. 91556 (Dec. 16, 2016).
[12] 81 Fed. Reg. 91558-59.
[13] Western states submitting individual comments to the Corps include: The State of Idaho; the State of Nebraska; the State of North Dakota; the State of Oklahoma; and the State of South Dakota. Comments were also submitted by the Western States Water Council; North Dakota Water Commission; North Dakota Water Users Association; Association of California Water Agencies; and the Texas Commission on Environmental Quality.

The Corps does not claim that federal law preempts state authority over natural flows through the Flood Control Act of 1944, the Water Supply Act of 1958, or any other relevant statute. Nor have states transferred or ceded any rights to, or authority over, the allocation and management of natural flows to the Corps. In its NPRM, the Corps acknowledges that some portion of waters to be defined as "surplus" would exist without Corps' water storage: "The Corps also recognizes that some withdrawals that it may authorize from a Corps reservoir pursuant to Section 6 could have been made from the river in the absence of the Corps reservoir project, and in that sense may not be dependent on reservoir storage."[14]

The proposed definition of "surplus waters" is beyond the scope of the Corps' statutory authority and would usurp states' well-established sovereign authority over the natural flows of water through Corps reservoirs. As a result, the Proposed Rule would conflict with Congress's clear intent to preserve state water law. Western Governors believe that any definition of "surplus waters" must plainly exclude natural historic flows from any quantification of waters subject to the Proposed Rule. Additionally, natural flows should be exempt from any monetary charges imposed by the Corps for water storage, as such waters would exist within the streambed in the absence of Corps reservoirs and would not be subject to federal management or the imposition of federal fees.

Rulemaking Process

In addition to the substance of the Proposed Rule, Western Governors are concerned about the process by which it was developed. States should be afforded the opportunity to consult with federal agencies as part of the development of any federal rule, policy or decision which may have significant impacts on states' authority – both inherent and delegated. Nowhere is state consultation more important than in the context of water resource management.

Western Governors emphasize in WGA Policy Resolution 2017-01, Building a Stronger State-Federal Relationship, that federal agencies should, "have a clear and accountable process to provide each state – through its Governor as the top elected official of the state and other representatives of state and local governments as he or she may designate – with early, meaningful, and substantive input in the development of regulatory policies that have federalism implications."[15] State consultation should be an ongoing process and should continue from the development stage of any proposed rule throughout its promulgation. As the agencies receive additional information, Governors and the state officials they designate should have the opportunity for ongoing engagement with the agencies to develop refinements to any rule.

Consistent with this policy, Executive Order 13132, Federalism, requires federal agencies to "have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have Federalism implications."[16] These policies include "regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government."[17] In its NPRM, the Corps declares that it "do[es] not believe that the

[14] 81 Fed. Reg. 91556 (Dec. 16, 2016).
[15] WGA Policy Resolution 2017-01, Building a Stronger State-Federal Relationship. Available at: http://westgov.org/images/editor/PR_2017-01_State_Federal_Relationship.pdf.
[16] 64 Fed. Reg. 43255 (Aug. 10, 1999).
[17] *Id*.

proposed rule has Federalism implications."[18] WGA disagrees with this assertion. The Proposed Rule clearly qualifies for further review under Executive Order 13132, as its provisions would have substantial direct effects on the states and their authority over the management and allocation of their waters. The Proposed Rule would also have a preemptive effect on state water laws (*i.e.*, a substantial effect "on the distribution of power and responsibilities among the various levels of government.").

Proper state consultation in an agency's decisionmaking process produces more durable, informed, and effective policy and allows for genuine partnerships to develop between federal and state officials. Providing states with an opportunity to submit written comments – which is already required under the Administrative Procedures Act - is not the same process as "consultation."[19] Federal courts have relied on an ordinary definition of "consultation" and have concluded that state consultation requires a meaningful opportunity for dialogue between state and federal officials, where federal decisionmakers "seek information or advice from" states or "have discussions or confer with [states], typically *before* undertaking a course of action."[20]

While WGA has submitted written comments under the normal procedures for public input, Western Governors have asserted that states should have been consulted throughout this rulemaking process. In addition to written comments submitted in response to the Corps' Notice of the Proposed Rule, WGA issued letters in August 2013 and again in October 2017 regarding the Corps' failure to adequately engage with states in the development of the Proposed Rule. It is our understanding that Corps officials have conducted little to no outreach to Governors' offices in response to their expressed concerns regarding the Proposed Rule. This failure to consult with states has resulted in a rule that largely ignores state concerns that have been consistently communicated to the Corps.

The Corps should develop rules and policies establishing comprehensive procedures for state consultation, requiring its officials to conduct pre-decisional – as well as ongoing – government-to-government engagement with states through their Governors' offices. Such measures should be implemented prior to any decision in which the Corps asserts jurisdiction over matters traditionally under state authority.

Conclusion

Western Governors have a history of responsible and comprehensive water management within their states and of working with federal agencies on water-related matters. The Proposed Rule has a substantial likelihood of interfering with, impairing, and/or subordinating states' well-established authority to manage and allocate the natural flows of rivers within their boundaries and to implement state water laws.

Any definition of "surplus water" must account for, and exclude, natural flows of the river from waters that would be subject to Corps control. The Corps should not deny access to divert and appropriate such natural flows, nor should the Corps charge storage or access fees where users are making withdrawals of natural flows from Corps reservoirs. No federal statute purports to assert federal jurisdiction over these waters or to preempt state law.

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[18] 81 Fed. Reg. 91556 (Dec. 16, 2016).
[19] *California Wilderness Coalition v. U.S. Dept. of Energy*, 631 F.3d 1072, 1087 (9th Cir. 2011).
[20] *The New Oxford Dictionary 369* (2001).

The Corps should consult with states, on a government-to-government level, to better understand the impacts the Proposed Rule may have on states' authority over water resources and ways in which the Corps can partner with states to effectively manage its projects and resources.

This concludes my testimony. Thank you again for providing the opportunity to testify and for bringing attention to these important issues of states' rights and federal responsibilities. I will be happy to answer any questions you have.