

HEARING ON OVERSIGHT OF THE ARMY CORPS' REGULATION OF SURPLUS
WATER AND THE ROLE OF STATES' RIGHTS

Wednesday, June 13, 2018

United States Senate

Committee on Environment and Public Works

Subcommittee on Superfund, Waste Management, and Regulatory
Oversight

Washington, D.C.

The committee met, pursuant to notice, at 3:15 p.m. in room
406, Dirksen Senate Office Building, the Honorable Mike Rounds
[chairman of the subcommittee] presiding.

Present: Senators Rounds, Booker, Ernst, and Van Hollen.

STATEMENT OF THE HONORABLE MIKE ROUNDS, A UNITED STATES SENATOR
FROM THE STATE OF SOUTH DAKOTA

Senator Rounds. Good afternoon. The Environment and Public Works Subcommittee on Superfund, Waste Management, and Regulatory Oversight is meeting today to conduct a hearing entitled Oversight of the Army Corps' Regulation of Surplus Water and the Role of States' Rights.

Today we are meeting to hear directly from stakeholders impacted by the regulatory decisions made by the U.S. Army Corps of Engineers. Their testimony will provide the subcommittee an opportunity to consider legislative changes available to Congress, as well as the on-the-ground, real-world consequences of decisions made by the Army Corps and their effect on States and municipalities.

Section 6 of the Flood Control Act of 1944 authorizes the Army Corps to make available to States, municipalities, and other entities surplus water stored in Army Corps reservoirs for municipal and industrial uses. The Flood Control Act also highlights the preeminent role of States and localities with regard to water rights, going so far as to state that it is the policy of Congress to recognize the primary responsibilities of States and local interests with regard to water supply.

In December of 2016, in the waning days of the previous Administration, the Army Corps published in the Federal Register

a Notice of Proposed Rulemaking entitled Use of U.S. Army Corps of Engineers Reservoir Projects for Domestic, Municipal, and Industrial Water Supply. This rulemaking sought to define, "key terms" in the Flood Control Act of 1944 and the Water Supply Act of 1958.

One of the key terms targeted by the proposed rule is surplus water. Surplus water appears undefined in Section 6 of the Flood Control Act. In the multi-decade period since the passage of the Flood Control Act, with the exception of the previous Administration, the Corps has declined to define surplus water. In formulating the proposed rule, the Army Corps failed to take into account natural flows of the river system when defining surplus water.

Congress clearly intended to recognize and reaffirm the constitutionally protected rights of States to the natural flow of water through these river systems. The proposed rule is an attack on these States' rights and the States' ability to access these natural flows.

In the case of my home State of South Dakota, we live with a permanent flood, as thousands of acres of productive farmland have been inundated to create the mainstem dams of the Missouri River. Last month, I was joined, in a letter, by South Dakota Governor Dauggaard, Senator Thune, and Representative Noem, in which we stated that 500,000 acres of our most fertile river

bottomlands were permanently flooded as the reservoirs filled following the construction of these dams. South Dakota citizens and tribal members were forced from their homes and communities.

No one doubts the benefits of multiuse Army Corps projects. But they need to be taken into proper historical context.

In taking such an expansive view of what constitutes surplus water and, thus, subject to Federal control, the Army Corps clearly does not recognize the constitutionally protected rights of States to the natural flows of the river system. Instead, the Army Corps is attempting to produce a system in which legitimate municipal and industrial projects cannot gain access to the water passing through the States by refusing to grant easements to gain access to these water resources.

The Army Corps is currently creating barriers to legitimate water uses. Earlier this year, when South Dakota's Game, Fish, and Parks Department requested access to an exceptionally small quantity of water from the Missouri River to construct a parking lot on government property adjacent to the reservoir, the Army Corps denied the request on the basis that this deeply flawed rulemaking had yet to be finalized.

We all agree that the Army Corps has a legal right to regulate the use of water for authorized purposes, such as flood control and hydropower generation. I am not seeking to divert any water away from congressionally authorized purposes. What I

am concerned with, however, is the notion that the people do not have a right to access the water passing through their States outside of well-defined purposes authorized by Congress.

Blocking access to such an important resource is in direct conflict with congressional intent. Preventing States from accessing the water they are entitled to is an attack on our federalist system of government.

I want to be clear. It was never the intention of Congress to federalize all of the water in our Country's major rivers. Any rulemaking to the contrary is an attack on the States' rights and an unlawful taking by the Federal Government.

My hope is that today's hearing will shed light on this issue and motivate the Army Corps to consider promulgating rules more consistent with congressional intent and the water rights of States. This also includes a review and discussion of the existing practice of the Army Corps denying access across their take land for legitimate purposes by the States and other approved users.

Now I would like to recognize Senator Booker for his five minute opening statement.

Senator Booker.

[The prepared statement of Senator Rounds follows:]

STATEMENT OF THE HONORABLE CORY A. BOOKER, A UNITED STATES
SENATOR FROM THE STATE OF NEW JERSEY

Senator Booker. Mr. Chairman, I have here my opening statement, which is nothing short of scintillating and also very moving.

Senator Rounds. I would expect nothing less.

Senator Booker. Yes. The time is short, though, sir. I am just going to submit it for the record.

Senator Rounds. Without objection.

Senator Booker. And I will pass out copies at the back for those of you who would like to read it right now.

[The prepared statement of Senator Booker follows:]

Senator Rounds. Thank you, Senator Booker.

Our witnesses joining us for today's hearing are Steve Pirner, Secretary of the South Dakota Department of Environment and Natural Resources; Ward Scott, Policy Advisor, Western Governors' Association; Stephen Mulligan, Legislative Attorney, Congressional Research Service.

I want to thank you all for being here and I would, at this point, turn to our first witness, Secretary Pirner, for five minutes.

I can't say enough, and I am just going to do this as a special introduction. Secretary Pirner was the secretary of Water and Natural Resources when I was governor. He was secretary before I became governor. He has been one of the stellar individuals with regard to his knowledge, his interest, and his intensity in making sure that we have clean air, clean water, and that we understand the relationship between the Federal and State government.

I know he is irritated every time I ask him to come to Washington, D.C.; he would rather be along the shores of the Missouri River and pier, particularly in the summertime, but I most certainly appreciate your participation in this hearing today. So, with that, Secretary Pirner, please proceed.

STATEMENT OF THE HONORABLE STEVEN M. PIRNER, SOUTH DAKOTA
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

Mr. Pirner. Thank you very much, Senator 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.

You all have heard about the waters of the U.S. rule proposed by 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 Corps of Engineers exceeds that Federal takeover action, at least as it impacts the Missouri River in South Dakota.

Our issues with the proposed water supply rule began in 2008. That was when the Corps issued Real Estate Guidance Policy No. 26. This policy requires municipal and industrial water users to acquire a water storage contract prior to the Corps issuing an access easement 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 our Missouri River, our largest and most reliable surface water supply in the State.

To advance the process, the Corps developed the proposed water supply rule. Under the rule, the Corps considered stored water, which is part of the surplus water, as being all the

water in the reservoirs. This creates a monumental change in 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 our Missouri River reservoirs with their stored water sitting on top of the river, with natural flow flowing underneath. That natural flow represents water that has traditionally been 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 and Section 1 of the 1944 Flood Control Act. We believe no other Federal law usurps these rights.

Another concern is equity. The Corps has documented the tremendous benefits that reservoirs supply to people throughout the basin. Yet, in this rule the Corps applies fees to just the upstream States.

To require the upstream States, who already have paid so much, to pay the cost through fees, with people in the downstream States enjoying those benefits at no cost, is not fair or equitable. As Governor Dauggaard wrote to the Corps in 2012, to impose all reservoir operation and maintenance costs on upstream States alone adds insult to injury.

We have about 1,000 miles of Missouri River shoreline in South Dakota, but only about 100 miles are on the two short,

free-flowing stretches in the State; the rest border the Corps reservoirs. Therefore, 90 percent of our shoreline is off limits to potential users of Missouri River water due to the Corps' moratorium and the proposed water supply rule.

Midland Contracting was one of the first to find this out when the Corps told them they could no longer pump water use for dust control out of the lake behind Big Ben Dam. The amount of water used from this reservoir, that is 80 miles long, 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.

Another example is the city of Pierre. They have been denied access for several years to the river, which runs right alongside the city, 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 19th, 2018, to use 90,000 gallons of Missouri River water out of the Oahe Reservoir. 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 South Dakota reservoirs are on hold until finalized guidance is

received from headquarters. An alternate source of water should be utilized." All of these uses of water were approved by the State through our State water rights program. More detailed objections to the proposed rulemaking have been submitted by Governor Dauggaard, and I have enclosed those 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 rulemaking effort tramples States' rights and needs to be stopped now, before the Corps finalizes the rule in September. The future of South Dakota, I believe, is linked directly to having a Missouri River water supply that we manage as a State. 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 equal footing doctrine, cooperative federalism, and protecting States' rights under the 1944 Flood Control Act.

Thank you, Senator, for the invitation to appear here today.

[The prepared statement of Mr. Pirner follows:]

Senator Rounds. Thank you for your testimony, Secretary Pirner.

We will now turn to our second witness, Ward Scott.

Mr. Scott, you may begin.

STATEMENT OF WARD J. SCOTT, WESTERN GOVERNORS' ASSOCIATION

Mr. Scott. Chairman Rounds, Ranking Member Booker, and members of the Subcommittee, I appreciate this opportunity to testify today on behalf of the Western Governors' Association. My name is Ward Scott and I am a policy advisor with WGA, where my work focused on western water policy and State-Federal relations.

Western Governors have consistently expressed their concern to the Corps regarding its December 2016 proposed rule. These concerns have focused on three primary elements: first, the proposed rule would likely 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; and, 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.

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 very greatly do account for local hydrology; the interplay between Tribal, State, and Federal legal rights; and complicated systems of water allocation. These State laws and the regulatory frameworks within which they operate must be accounted for in the development of any Corps rule.

Western Governors have adopted a bipartisan policy that articulates a fundamental principle recognized by both Congress and the U.S. Supreme Court, which is that 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.

This well-established State authority is rooted in the U.S. Constitution as States, upon their admission to the Union, established their sovereign authority over water resources under the equal footing doctrine and continue to maintain this broad authority unless preempted by Federal law.

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 a federally authorized purpose of that reservoir. This definition fails to distinguish between surplus water, which is defined in relation to storage and authorized purposes, and natural flow, which is defined as waters that would have been available for use in the absence of Federal dams and reservoirs.

In its Notice of Proposed Rulemaking, the Corps does not claim that its authorizing statutes, or any other relevant Federal statute, preempts State authority over a river's natural flows. Rather, both the Flood Control Act of 1944 and the Water Supply Act of 1958 clearly direct the Corps to recognize and defer to State law. Nor have States transferred or ceded to the Corps any rights to or authority over the allocation and management of natural flows.

The Corps' proposed definition of surplus water is beyond the scope of its statutory authority and would usurp States' well-established rights 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 and authority.

Western Governors believe that any definition of surplus waters must plainly exclude natural historic flows from any qualification of water subject to the proposed rule.

Western Governors' concerns also extend to the process by which the rule was developed. States should be afforded the opportunity for early, meaningful, substantive, and ongoing consultation with Federal agencies as part of the development of any Federal rule, policy, or decision which may have impacts on State authority. Nowhere is State consultation more important than in the context of western water resource management.

Consistent with this policy, Executive Order 13132 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.

In its notice, the Corps declares that it does not believe that the proposed rule has federalism implications. 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, as well as preemptive effects on States' water laws.

Proper State consultation in an agency's decision-making 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 as consultation.

In conclusion, the Corps' 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 States 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.

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 more effectively manage its projects.

Thank you again for providing this opportunity to testify and for bringing attention to these important issues of States' rights and Federal responsibilities.

[The prepared statement of Mr. Scott follows:]

Senator Rounds. Thank you for your testimony, Mr. Scott.
We will now turn to our third witness, Stephen Mulligan.
Mr. Mulligan, you may begin.

STATEMENT OF STEPHEN MULLIGAN, J.D., LEGISLATIVE ATTORNEY,
CONGRESSIONAL RESEARCH SERVICE

Mr. Mulligan. Thank you, Mr. Chairman. Chairman Rounds, Ranking Member Booker, my name is Stephen Mulligan. I am a legislative attorney in the American Law Division of the Congressional Research Service. Thank you for inviting me to testify today on behalf of CRS. I will be addressing legal authorities related to the Army Corps of Engineers' regulation of surplus water and the role of States' rights.

While there may be a number of policy-related questions that arise this afternoon, my testimony focuses on the Corps' legal authorities. Separate from this testimony, CRS has provided a memorandum to the Subcommittee written by my colleague, Nicole Carter, that addresses many of the policy and process-related issues.

The Supreme Court historically has held that the Corps' authority for projects in navigable waters derives from the Commerce Clause and the Federal Government's interest in promoting navigation throughout the Nation's waterways.

In 1899, the Court explained that the States' control of the appropriation of their waters is subject to the superior power of the general government to secure the uninterrupted navigability of all the navigable streams within the limits of the United States.

In the 1940 decision, the Court held that a State could not enjoin the Corps from constructing a dam or reservoir, even if the water impounded within the reservoir was controlled by the State because, in that case, the State's program for water development and conservation must bow before the superior power of Congress.

But the Supreme Court also has a long history of cases recognizing that a State owns the navigable waters within its borders. When the United States was formed, the Supreme Court explained the people of each State became themselves sovereign, and in that character hold the absolute right to all 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. Under the constitutional equal footing doctrine, States that later joined the Union acquired the same rights granted to the original States and, therefore, also acquired ownership of their States' navigable waters upon achieving statehood.

When these two lines of cases are viewed together, there is a tension between the rights of States to use and regulate navigable waters within their borders and the right of the Federal Government to exercise the authority under the Commerce Clause. And this tension is not limited to high level constitutional principles; it also exists within the texts of

the relevant authorizing statutes for the Army Corps of Engineers. The Flood Control Act of 1944 authorizes various Army Corps projects in navigable waters. It also authorizes the Corps to contract for surplus water that may be available at Federal reservoirs under the control of the Department of the Army.

Even though the statutes grants authority to the Secretary of the Army as an exercise of Federal power, it also provides that it is 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.

Similarly, the Water Supply Act of 1958 is an exercise of Federal power that authorizes certain Corps action with regard to Federal reservoirs, but it provides that Congress recognizes that the primary responsibilities of the States and local interests in developing water supplies for domestic, municipal, industrial, and other purposes.

This tension created by the interplay between Federal power derived from the Commerce Clause and States' sovereign right to navigable waters has manifested itself in discussion over the Corps' 2016 Notice of Proposed Rulemaking on the use of U.S. Army Corps of Engineers reservoir projects for domestic, municipal, and industrial water supply.

Some have called into question whether the proposed rule is a valid exercise of Federal constitutional and statutory authority. While some aspects of the Corps authority on which the proposed rule is based have been the subject of litigation, such as the division of authority between the Corps and the Department of the Interior under the 1944 Flood Control Act, it does not appear that the provision in question has been litigated with respect to potential interference with State ownership of water.

To date, the Supreme Court has not clearly defined the Corps' obligation with respect to States' rights over surplus water that is held in or passes through the Corps' reservoirs.

Thank you, and I will be happy to answer questions at the appropriate time.

[The prepared statement of Mr. Mulligan follows:]

Senator Rounds. Mr. Mulligan, thank you very much for being here and thank you for your participation today.

We all each have now five minutes in which to work through our questions. There are just a couple of us here. We will take our time, work our way through this. We most certainly appreciate all of your participation.

Let me begin with some of the concerns that we have tried to express here and try to flush them out just a little bit. Let me begin with Secretary Pirner.

As a public service, you have been involved in this process for more than 20 years, I would say. I won't say how much longer than 20 years, but more than 20 years. You probably are uniquely situated to have seen the ongoing processes involved in this discussion throughout several decades.

From a quality of life standpoint, can you speak to the impact this proposed rule could have on not just South Dakota, but all of rural America?

Mr. Pirner. Yes, sir, Senator Rounds. The Missouri River into South Dakota, as I mentioned during my testimony, is the largest, most reliable surface water supply in South Dakota. South Dakota is a relatively arid State. Our other surface water supplies are seasonal, especially on the eastern side of the State. At times we go to zero flow in the fall. Groundwater is basically our remaining water supply, and there

we don't have it everywhere, and where we do have it a lot of times the quality is poor. So, the Missouri River is a high quality, very, very important water supply to the State.

You talked about quality of life. It is not only a recreational use; it is also a major water supply use. By now, we have 126, out of our 464, drinking water systems that are regulated under the Safe Drinking Water Act that get their water from the Missouri River. That is 27 percent of our water systems.

Senator Rounds. Let me just stop you right there very quickly. Can you share a little bit about, most recently, the challenges that some of the drinking water systems that even are currently in effect have had accessing to repair or upgrade their systems with even getting access over the Corps' take land, which is the land which surrounds the reservoir system that they have purchased in order for the water to rise and fall? They have a take line, it is basically Federal Government property that they control, but in order to get to the water you cross Corps land in 90 percent of South Dakota.

Can you talk a little bit about the way that they have treated some of our water systems, trying to even upgrade systems that are even already right there?

Mr. Pirner. Yes, Senator. I think you are talking about the Randall Rural Water System.

Senator Rounds. I am.

Mr. Pirner. Which has a surface water intake in the Missouri River. They want to do some upgrade and they really have been unable to at this point because of this access issue. No easement. There is an existing line, there is an existing uptake. They just simply want to upgrade and make better their system, but to date they have been refused access to even do that.

Senator Rounds. This was more than just one or two months?

Mr. Pirner. I believe so, yes, sir.

Senator Rounds. Like perhaps years?

Mr. Pirner. I don't know the exact time. All I know is they are still waiting.

Senator Rounds. How about the city of Pierre?

Mr. Pirner. The city of Pierre has an interesting little project. Again, the Missouri River borders the city, the capital of South Dakota. The river is an important aspect, part of the whole city. I mean, again, it is there and people use the Missouri River extensively. The city was looking at cutting its water costs, plus the State government. The State campus is there as well. They were going to do a joint project, put in a pump station, irrigate the city's green space plus the entire State campus with water directly from the river, thereby saving time and money and costs.

Senator Rounds. Watering the lawn.

Mr. Pirner. Yes, sir. That would be correct. Or irrigation. We tried to say that it was irrigation, but so far that hasn't worked yet either.

But, anyway, again, we issued them a water right to do that, I think two years ago.

Senator Rounds. Within the existing flow of the Missouri River.

Mr. Pirner. Exactly. And about two years ago, I think it was. At this point in time the Corps has been unresponsive to granting an easement across the take line for them to install that pump station.

Senator Rounds. So, do you think, based on that, if we had the Corps with their projects in place, with this approach right now, could we have even begun to develop the State of South Dakota along the Missouri River, basically 500 miles? Under these conditions, could we have even access to begin creating towns along the Missouri River based upon the current policy that the Corps has?

Mr. Pirner. No, sir, I don't believe so. We have towns both near and far that are relying on the Missouri River today for their water supply source. I talked about 27 percent of the water systems. That equates to over 22 percent of our entire population is drinking Missouri River water. If you add in

Lewis and Clark Regional Water System, which relies on wells alongside the river, that is about another 225,000 people. They don't have a surface water intake, but their wells are certainly directly influenced by the flow in the Missouri River.

So, all of those systems are using water that we believe have been allocated to them by the State through our existing water rights process. Under this system that is being proposed, either the Corps would have to approve, basically would have veto power over any State water right that we would issue, or would have to find some mechanism to try to fit those systems into their new policy.

Senator Rounds. On the other hand, I want to bring this to bear. What we are actually getting at here, if I understand it correctly, since they basically have purchased land along the river in order to create the mainstem dam of the Missouri River, the mainstem dam system, the Pick Sloan project, they have purchased land and now, in order to get access to the water, you have to have an easement to get across their land.

There are a couple of miles there in which we have natural flows, and which the Corps does not have that particular land right, so in those particular cases, since they are in the normal flow area of the Missouri, and we probably run 30 to 35,000 cubic foot per second, average year-in, year-out, through the Missouri River system, someone could, if they didn't have to

cross Corps land, go directly back in with an appropriate State water right or approval, access that water. But since the Corps has this access land along it, they have prohibited, since 2008, development along the river because they were not issuing access across the land, which they had to the water, which the State has and is identifying as their responsibility to determine water rights for.

Mr. Pirner. Yes, sir, that is correct.

Senator Rounds. Thank you.

Senator Booker.

Senator Booker. Keep going.

Senator Rounds. I would. I think this is the crux of the issue, and I am just curious.

Mr. Mulligan, I have a question for you. I appreciated your layout of the history on this. Under the equal footings, all States now come in to our Country with equal footings with the other States that were there to begin with. The original 13 States making up the original United States clearly protected their water sources. They clearly issue water rights today.

In your research, have you found other areas where the Corps is restricting access to free-flowing rivers or to other reservoirs in which they may have an interest, or are they prohibiting the access to those in other States other than on the Missouri River at this time? Can you share with us a little

bit about their history of trying to do that?

Mr. Mulligan. Thank you, Mr. Chairman. The proposed rule here would be a rule of nationwide application, and the changes in the Corps' policy over the last decade or so are also, by and large, the ones that have been referenced today are of nationwide application, so these aren't changes or proposed changes that are just being applied in a certain area of the Country. So, just in terms of the Corps' policy, this is something that is not localized.

In terms of the equal footing doctrine, I think that it has been correctly described. When a new State joined the Union, it entered with the same rights, the same water rights as the original 13 colonies. In doing research, the Corps has sort of analyzed that, and in looking to the water rights of those original 13 colonies, the Supreme Court has said, in certain circumstances, the Federal Government through the Commerce Clause power may exercise rights over those original 13 colonies, over their water rights.

So, when a new State comes in and steps into equal footing, it also sometimes gives way to the Federal Government's Commerce Clause powers.

Senator Rounds. I am just curious. In the Flood Control Act of 1944, which is the authorizing act which created the mainstem dams on the Missouri River, there was a discussion at

that time, and when the law passed Congress, was there specific mention of the States' water rights which were there? Could you kind of go through that again with us, a little bit about the folks who wrote the law, the 1944 Act, could you share a little bit?

I know you mentioned it, I believe, and I will come to Mr. Scott next, but can you go through and share with us a little bit about what the intent was, or at least what was stated within that law with regard to the Federal Government utilizing those water resources, or controlling them?

Mr. Mulligan. Thank you, Senator. You are correct that in the Flood Control Act of 1944 there was discussion in the Congressional Record in terms of the debate over how to effectuate the Pick Sloan project and how to incorporate that project into legislation. There is debate over how to protect, at best, recognize and protect State rights. That debate manifests itself in Section 1, to a certain degree in Section 1 of the Flood Control Act, which has a statement of congressional purpose that I read in my opening testimony that expressly recognizes Congress's position to recognize the primacy of State rights to control navigable waters within their borders.

Senator Rounds. The primacy of the States' rights to control the water within their borders on these navigable waterways.

Mr. Mulligan. I am not quoting now, I don't have the language in front of me, but a general statement to that effect.

Senator Rounds. I think what I am getting at is the gist is the folks who wrote that law to create the dam system appears to me to clearly have tried to delineate and to reestablish, for anybody that wanted to read it, that they were recognizing the States' rights to access that free flow through that river system. Is there anything that gives you pause to that attempt?

Mr. Mulligan. Thank you for the question, Senator. There was a discussion of protecting States' rights. In terms of a discussion and use of the term natural flow, that is not something that you see in relationship to the Flood Control Act and it is not sort of a legal term of art that you see developed doctrinally. So, while there is a high level discussion, the term natural flow, trying to separate natural flow from surplus waters is not prominent in the record.

Senator Rounds. Thank you.

Mr. Scott, same question, basically. Within the 1944 Flood Control Act, or the other acts that have been established since then, it would appear to me that Congress has worked very hard to try to make it clear that the States still maintained their responsibility and authority over water rights within their States. Can you elaborate a little bit on what you have been able to determine in your research?

Mr. Scott. Thank you, Senator. We feel that the 1944 Flood Control Act, as well as several Federal statutes, recognize that State authority and try to preserve it. We feel that while surplus water is an ambiguous term in that statutory language that the Corp does have authority to interpret, they should be guided by that clear intent of Congress to preserve State authority over water resources and allocation.

Senator Rounds. Thank you.

Secretary Pirner, same question. With regard to the research that you have done and the work that has been decided within the activities that you have been involved with, court cases and others, and the research with regard to the critical language found within the 1944 Act, the other pertinent acts, do you find where there was clear evidence that Congress was doing its best to protect the interests of the States in determining water uses along these rivers, regardless of whether or not the Corps had access rights?

Mr. Pirner. Yes, Senator. If you look at Section 1, that was talked about, of the 1944 Flood Control Act, it states, and I will quote, I am using a paraphrase here, but this is a quote: "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."

So, we believe that that language clearly preserves the States' rights that have been talked about again. That was, again, Section 1 of the 1944 Flood Control Act.

I think the other issue to consider, and we have touched upon it very briefly, is the upper basin States paid a heavy price for those reservoirs. You talked about losing 500,000 acres of our best fertile bottom and, never to be seen again. We were supposed to get irrigation as part of the payment for the permanent loss of those lands, but that has never occurred.

But I think if you take that into account, clearly, I don't think Congress would have passed the 1944 Flood Control Act by giving the Federal Government total control, then, over essentially all of the flow in the Missouri River that flows through South Dakota.

Senator Rounds. Would it be fair to say that the inflexibility that happens at the Federal level when you try to do a one-size-fits-all, would it have been manifested in 2011? In 2011 we had a flood on the Missouri River. It occurred because of substantial rain, heavy snowfall, and a delay, in my opinion, in the release of water trying to save downstream States, and rightfully so, trying to help folks by holding as much water as possible in the upper mainstem dams.

We ended up having water flows through the Missouri River system closing in on 160,000 cubic feet per second, which rose

probably three to four feet above flood stages throughout the entire system. The damage was significant.

And the reason why I asked the question, even during this time in which we had flood waters flowing through the area, there was a request to utilize a limited amount of water out of the mainstem dams, which at this point were over flood stage and we had nearly a free-flowing Missouri River.

Secretary Pirner, can you share what the response from the Corps was, once again during a time of flooding in which we didn't have enough capacity to even hold the water, as to how inflexible the ability to get permission to even access, to get a limited amount of water out of the Corps reservoirs? Just for emphasis.

Mr. Pirner. Yes, Senator. Again, the Corps would not grant that access. And when you talk about a limited amount of water, I would call it miniscule. I mean, it would not have helped the flood. But here we are in flood stage. We are spending tons and tons of Federal, State, and local monies building levees alongside the river, trying to protect the communities that were in harm's way, and to deny access to the river for some pumping for a contractor who wanted to use it for a construction project just didn't make any sense.

Senator Rounds. Thank you.

Senator Booker. You have been very patient. Thank you,

sir.

Senator Booker. Sir, I, first of all, want to thank the witnesses. A lot of people don't understand how important it is for folks like you to come down here and engage in this discussion and dialogue on issues that are actually really, really important. One of my favorite authors is a woman named Alice Walker, and she says the real revolutionaries are always concerned with the least glamorous stuff; raising a child's reading level, filling out food stamp forms because folks have to eat, revolution or not. The real revolutionaries are always close enough to the people to be there for them when they are needed.

So it is really an honor to sit next to a man who was a former governor, who is also now a Senator, who is not just about the large issues we are all seeing on TV, but really in the weeds on issues that are really important to the people in his communities, and something as important as this.

And I am grateful for you all taking some time out, traveling long distances to come down here.

The last thing I will say, Mr. Chairman, is that, as a New Jersey Senator, I know that my governor can't get into the Western Governors' Association, but he is from western New Jersey. I don't know if that counts.

But, in many ways, as different as our topography or our

Nation is, we actually do share common values and common ideals, and I heard that those were expressed today by a lot of people, about local folks often know how to make the best decisions for what is important to them, so it was refreshing. I learned a lot in this hearing. I did not know what surplus water was, sir, before I did my reading last night, and I just want to say what an honor it is to sit next to you and listen to you talk about such an important issue for your community.

Senator Rounds. Thank you, Senator. Look, let me share with you. It has been a very busy day and I think most of us have had 25 to 28 different events, including Senator Booker. He has taken time to come in so that we can do this. We don't do a hearing without having both sides represented on these, and Senator Booker is taking time out of his very busy day to come in, recognizing that, for many of us, this is a Missouri River issue, as an example.

So, Senator, I want to thank you for the time that you have taken out of a very busy schedule to come and participate so that we can share this with the rest of the Country, and I thank you for that, sir.

At this time I would ask unanimous consent to not only include all of your statements for the record, but I would also ask unanimous consent that four letters from Governor Duggard to the Army Corps be submitted and accepted; a letter from

Governor Dauggaard to the South Dakota Congressional Delegation; a letter from Governor Dauggaard, Senator Thune, Representative Noem, and myself to President Trump; a letter from the South Dakota Department of Game, Fish, and Parks to the Army Corps; a letter from the South Dakota Association of Rural Water Systems to this subcommittee; a letter from the Western States Water Council to the Army Corps; a letter from the National Water Supply Alliance to this subcommittee.

Without objection, so ordered.

[The referenced information follows:]

Senator Rounds. Once again, I want to thank all of you for coming and participating in this, and I hope that this helps to bring some focus on what I think is a true injustice that has been started and that we would like to see eliminated as quickly as possible so that normal people can get access to drinking water once again, which is a lot of what this is all about.

So once again I would like to thank our witnesses for taking the time to be with us today, and I would also like to thank my colleague who attended this hearing, and also for your thoughts and your questions.

The record will be open for two weeks, which brings us up to Wednesday, June 27th. This hearing is adjourned. Thank you.

[Whereupon, at 3:59 a.m. the committee was adjourned.]