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TESTIMONY

Statement of

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

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Chairman Rounds, Ranking Member Booker, and Members of the Subcommittee, my name is Stephen Mulligan. I am a legislative attorney in the American Law Division of the Congressional Research Service (CRS). Thank you for inviting me to testify on behalf of CRS regarding the U.S. Army Corps of Engineers (Corps) regulation of surplus water and the role of states' rights.

The Corps operates federal water projects for a variety of purposes, which Congress identifies when it authorizes a project.[1] Various water supply shortages and greater demand for water supply related to municipal and industrial uses (M&I) have brought increased attention to disputes over the control of water resources across the country. For example, new applications of energy extraction technologies have increased oil and gas production from shale formations in various regions of the United States.[2] And expanding populations in the United States have created greater need for domestic access to water sources.[3]

Although the federal government has authority related to water resources management, water allocation has traditionally been a matter left to the states, which administer their own water rights systems, and which possess certain rights to regulate the water use within their boundaries as an attribute of state sovereignty.[4] At the same time, the Supreme Court has long recognized that federal constitutional powers—primarily the Commerce Clause—may limit states' rights to control their waters.[5] This dual exercise of authority over water resources has led to questions regarding a recent Corps' rule entitled "Use of U.S. Army Corps of Engineers Reservoir Projects for Domestic, Municipal & Industrial Water Supply" (Proposed Rule), discussed in more detail below.[6]

Constitutional Authority for Water Storage at Federal Water Projects

The Corps has broad constitutional authority for its water projects. The Supreme Court historically has held that the Corps' authority derives from the Commerce Clause and the importance of promoting navigation throughout the nation's waterways.[7] The breadth of this authority regarding various purposes of the Corps' operations has been recognized by the Supreme Court in multiple cases.

In 1899, the Court explained that the states' control of the appropriation of their waters was subject to "the superior power of the General Government to secure the uninterrupted navigability of the all

[1] For additional background on authorized purposes for Corps' projects, see CRS Report R42805, *Reallocation of Water Storage at Federal Water Projects for Municipal and Industrial Water Supply*, by Cynthia Brown and Nicole T. Carter. For analysis of certain policy-related issues to the Corps' reservoirs, see the congressional distribution memorandum submitted with this testimony titled Army Corps of Engineers Reservoirs: Municipal and Industrial Water Supply Activities by Nicole Carter, Specialist in Natural Resources Policy, dated June 12, 2018 [Carter Memorandum].

[2] *See* CRS Report R42333, *Marcellus Shale Gas: Development Potential and Water Management Issues and Laws*.

[3] *E.g.* In re MDL-1824 Tri-State Water Rights Litig., 644 F.3d 1160, 1171 (11th Cir. 2011) (discussing the growing water needs in Atlanta).

[4] *See infra* § State Ownership of Water Within Its Boundaries.

[5] *See* U.S. CONST., art. I, §8, cl. 3 ("The Congress shall have power to . . . regulate commerce with foreign nations, and among the several states, and with the Indian tribes . . . ."). *See also infra* § Constitutional Authority for Water Storage at Federal Water Projects.

[6] Use of U.S. Army Corps of Engineers Reservoir Projects for Domestic, Municipal & Industrial Water Supply, 81 Fed. Reg. 91556 (Dec. 16, 2016) [Proposed Rule].

[7] *See* Gibbons v. Ogden, 22 U.S. 1 (1824).

navigable streams within the limits of the United States."[8] Citing this principle, the Court later held that a state could not enjoin the Corps from constructing a dam and reservoir, even if the water impounded within the reservoir was controlled by the state.[9] The Court rejected the state's argument that the project would interfere "with the state's own program for water development and conservation … [which] must bow before the 'superior power' of Congress."[10]

The Court has indicated that Congress's constitutional "authority is as broad as the needs of commerce."[11] It has explained that maintaining the navigability of waterways is only one of the various purposes for which the federal government may exercise authority over water.[12] The Court has stated that if a particular project serves a purpose of navigation, "it is constitutionally irrelevant that other purposes may also be advanced."[13] It has cited other valid purposes such as flood control, watershed development, and "recovery of the cost of improvements through utilization of power" as examples of the breadth of federal authority over waters.[14]

Thus, a state's authority over its waters is "subject to the power of Congress to control the waters for the purpose of commerce."[15] Accordingly, if Congress authorizes the Corps to impound water at one of its projects for purposes related to commerce, the federal authority over the water likely supersedes the state's authority for those purposes. Notwithstanding this broad authority, Congress historically has deferred to states' authority regarding water allocation, as discussed below.

Statutory Authority Related to Water Storage at Corps' Projects

Under the Flood Control Act of 1944 (1944 FCA),[16] the Corps may enter contracts with other government or private parties for the temporary use of surplus water from its projects.[17] Under the Water Supply Act of 1958 (WSA),[18] the Corps may enter storage agreements providing permanent storage space at a reservoir, even if Congress did not originally authorize such a purpose for the project.[19] The Corps' guidance states that surplus water contracts generally should have terms of five years.[20]

[8] United States v. Rio Grande Dam and Irrigation Co., 174 U.S. 690, 703 (1899).

[9] Oklahoma v. Atkinson, 313 U.S. 508 (1941) ("Since the construction of this dam and reservoir is a valid exercise by Congress of its commerce power, there is no interference with the sovereignty of the state.").

[10] *Id*. at 534-35.

[11] United States v. Appalachian Electric Power Co., 311 U.S. 377, 426 (1940).

[12] *Id*.

[13] United States v. Twin City Power Co., 350 U.S. 222, 224 (1955).

[14] United States v. Appalachian Electric Power Co., 311 U.S. at 426.

[15] *Id*. at 423.

[16] Act of December 22, 1944, 58 Stat. 887.

[17] 33 U.S.C. §708.

[18] 43 U.S.C. §390b.

[19] 43 U.S.C. §390b.

[20] *See* U.S. ARMY CORPS OF ENG'RS, PLANNING GUIDANCE NOTEBOOK, ER 1105-2-100, at app. E (2000) [ER 1105-2-100].

Section 6 of the Flood Control Act of 1944

Section 6 of the 1944 FCA specifically authorizes the Corps to enter contracts for surplus water. The Corps "is authorized to make contracts with States, municipalities, private concerns, or individuals, at such prices and on such terms as [it] may deem reasonable, for domestic and industrial uses for surplus water that may be available at any reservoir under the control of the [Corps]."[21] The contracts entered under Section 6 must not "adversely affect then existing lawful uses of such water."[22] Section 1 of the 1944 FCA states that "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 . . . ."[23] While some aspects of the Corps' authority under the 1944 FCA have been the subject of litigation—such as the division of authority between the Corps and the Department of the Interior[24]—it does not appear that Section 6 has been litigated with respect to potential interference with state ownership of water.

The Water Supply Act of 1958

In 1958, Congress recognized state primacy in developing M&I supplies, stating,

> It is hereby declared to be the policy of the Congress 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 in connection with the construction, maintenance, and operation of Federal navigation, flood control, irrigation, or multiple purpose projects.[25]

To promote this policy, the WSA authorizes the Corps to include water storage for M&I use as a project purpose for new and existing projects: "[S]torage may be included in any reservoir project surveyed, planned, constructed or to be planned, surveyed and/or constructed by the Corps of Engineers … to impound water for present or anticipated future demand or need for municipal or industrial water…."[26]

The WSA includes some limits on how the Corps may add M&I storage as a purpose for its projects.[27] Congress indicated that construction and modification costs would be shared by state and local interests and that such costs would be "determined on the basis that all authorized purposes served by the project shall share equitably in the benefits of multiple purpose construction."[28] The WSA states that it does not modify Section 1 of the 1944 FCA.[29]

Additional Statutory Authorities and Restrictions

In addition to the WSA and 1944 FCA, other federal laws may impact the Corps' ability to enter water supply agreements or assess charges for such agreements on a project-specific or location-specific basis.

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[21] 33 U.S.C. §708.

[22] *Id.*

[23] 33 U.S.C. §701-1.

[24] *E.g.*, ETSI Pipeline v. Missouri, 484 U.S. 495, 509 (1988) (concluding that the 1944 FCA gave the Corps, and not the Department of the Interior, and authority to contract to provide "surplus water" from Lake Oahe).

[25] 43 U.S.C. §390b(a).

[26] 43 U.S.C. §390b(b).

[27] Modifications authorized by the WSA that "seriously affect" original purposes or "involve major structural or operational changes" must be approved by Congress. 43 U.S.C. §390b(e).

[28] 43 U.S.C. §390b(b).

[29] 43 U.S.C. §390b(d).

For example, under the Water Resources Reform and Development Act of 2014 (WRRDA 2014), no charges may be assessed on surplus water contracts on the Missouri River mainstem reservoirs until June 2024.[30] Other federal laws have mandated that the Corps enter into agreements authorizing usage of specific federal facilities during droughts or emergencies and have specified the cost that may be allowed for water supply.[31]

State Ownership of Water Within Its Boundaries

The U.S. Supreme Court has long held that a state owns the navigable waters within its borders.[32] In 1842, the Court explained that when the United States was formed, "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."[33]

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 state's navigable waters upon achieving statehood.[34] Thus, states that were admitted to the union and were not part of the original 13 colonies still may claim certain rights to waters within their state boundaries.

Although the Supreme Court recognized state ownership of water within state boundaries, it also has indicated that the state's interest in its waters could be limited by superseding rights assigned under the Constitution to the federal government.[35] In other words, a state may not claim absolute ownership to navigable waters if the federal government has constitutional authority to act with respect to those waters.

Congressional Treatment of States' Water Rights at Federal Water Projects

Although the federal government has authority to regulate water, Congress historically has deferred to the states' authority regarding allocation of water resources within each state. In some cases, Congress explicitly has recognized the states' power to assign water rights, though it has done so on a limited basis. At other times, it has noted the competing roles of federal and state governments with respect to water resources management and included general statements recognizing the interests of a state related to specific legislation.

In some instances, Congress has recognized the authority of states to allocate water and consequently required federal compliance with state water rights schemes. For example, Section 8 of the Reclamation Act of 1902 (Reclamation Act) requires the Bureau of Reclamation (Reclamation) to conform with state

[30] Water Resources Reform and Development Act of 2014, Pub. L. No. 113-121, § 1046(c).

[31] *E.g.*, Water Resources Development Act of 2007, Pub. L. No. 110-114, § 5019(c)(1) ("The Secretary shall enter into an agreement with the Delaware River Basin Commission to provide temporary water supply and conservation storage at the Francis E. Walter Dam, Pennsylvania, for any period during which the Commission has determined that a drought warning or drought emergency exists."); *id.* § 5019(c)(2) ("The agreement shall provide that the cost for water supply and conservation storage under paragraph (1) shall not exceed the incremental operating costs associated with providing the storage.").

[32] *E.g.,* Tarrant Reg'l Water Dist. v. Hermann, 133 S. Ct. 2120, 2132 (2013) ("States possess an 'absolute right to all their navigable waters and the soils under them for their own common use.'") (quoting Martin v. Waddell's Lessee, 41 U.S. 367, 410 (1842)).

[33] *Martin*, 41 U.S. at 410.

[34] *Pollard*, 44 U.S. at 228-29. *See also* U.S. CONST. art. IV, §3, cl. 1.

[35] *E.g., Martin*, 41 U.S. at 410.

water laws "relating to the control, appropriation, use, or distribution of water . . . ."[36] The Supreme Court has explained that Section 8 "requires the Secretary to *comply* with state law in the 'control, appropriation, use or distribution of water'" by a federal project, confirming that Reclamation must acquire water rights for water it impounds at its water projects in various states (as had been the agency's practice).[37] Reclamation then contracts with water users to provide water. Reclamation generally holds the water right, which is allocated by the state's water authority, and the water users hold a contract right to the water provided under their agreement with Reclamation.[38]

The 1944 FCA and WSA do not include an identical requirement that the Corps must "comply" with state law in its water use. While there are textual differences between the Reclamation Act and the Corps' statutory authorities, Congress has not ignored the relationship between federal legislation authorizing the Corps' projects and state water rights. The 1944 FCA and WSA arguably may indicate that Congress intended to protect the states' ability to administer water rights under state law to some degree despite the Corps' use of the water.

In Section 1 of the 1944 FCA, Congress stated "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 . . . ."[39] Congress included specific protection for waters in states "lying wholly or partly west of the ninety-eighth meridian"—the drier, western states.[40] Section 1(b) states that the use of waters in those states is authorized for navigation only if it "does not conflict with any beneficial consumptive use, present or future, in [such states], of such waters for domestic, municipal, stock water, irrigation, mining, or industrial purposes."[41] In other words, the Corps is not authorized to use water for navigation in the western states if the Corps' use of the water would interfere with other beneficial uses.

The WSA states that it does not modify Section 1 of the 1944 FCA, potentially signaling that Congress was not authorizing interference with certain other uses of water at federal projects. During hearings related to the passage of the WSA, a Senate subcommittee debated that provision and the effect the legislation would have on state water rights.[42] One Senator, advocating for recognition of states' authority to administer water rights, explained that federal law requires that any water used in Reclamation projects be acquired through water rights assigned by the state in which the project is located, and argued that the Corps likewise should be required to comply with state water laws.[43] Although the final legislation did not include an express statement requiring the Corps to obtain state water rights for its projects, Congress amended the original language to remove a provision that was thought to imply that only certain water

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[36] *See* 43 U.S.C. §383. Section 8 states the following:

> [n]othing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof.

Id.

[37] *See* California v. United States, 438 U.S. 645, 674-75 (1978) (emphasis added).

[38] In some cases, water users may have perfected a water right prior to a project's construction and may receive water from a Reclamation project under a separate delivery contract.

[39] 33 U.S.C. §701-1.

[40] 33 U.S.C. §701-1(b).

[41] *Id*.

[42] U.S. Congress, Senate Committee on the Public Works, Subcommittee on Flood Control—Rivers and Harbors, *Rivers and Harbors—Flood Control Act of 1958*, *Hearing on S. 3910*, 85th Cong, 126-35 (1958).

[43] *Id*. at 131.

rights under state law may be recognized.[44] The final language states that the authority provided under the WSA "shall not be construed to modify" Section 1 of the 1944 FCA or Section 8 of the Reclamation Act.[45]

The December 16, 2016 Proposed Rule

On December 16, 2016, the Proposed Rule regarding the Corps' policies and regulations related to the use of reservoir projects for M&I supply was published in the Federal Register.[46] Although subject to change, the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget currently states that a final action on the Proposed Rule is expected to take place in January 2019.[47]

The Proposed Rule provides that it is intended to set forth the Corps' interpretations of its authority under Section 6 of the FCA 1944 and the WSA.[48] The Corps' states that the "overall intent" of the Proposed Rule is to "enhance the Corps' ability to cooperate with State and local interests by facilitating water supply uses of Corps reservoirs in a manner that is consistent with the authorized purposes of those reservoirs, and does not interfere with lawful uses of water under State law or other Federal Law."[49] The Proposed Rule would apply only to Corps reservoir projects and not to projects operated by other federal or non-federal entities.[50]

The Proposed Rule states that it has multiple objectives:

1. Defining certain statutory terms and explaining differences among statutory authorities;
2. Addressing certain policy questions, including pricing of surplus water agreements under Section 6 of the FCA 1944; reallocation of storage under the WSA; and accounting of storage usage and return flows under WSA agreements; and
3. Clarifying and simplifying processes for approving and entering into water supply agreements at Corps reservoirs.[51]

The following discussion addresses those provisions that are most relevant to surplus water. [52]

Definitions of Statutory Terms

Among other things, the Proposed Rule would provide a common definition for the terms "reservoirs," "projects" and "reservoir projects" as those terms are used in the WSA and Section 6 of the 1944 FCA.[53]

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[44] *See id.* at 134-35. The following language was from the WSA: "nor shall any storage provided under the provisions of this section to be operated in such manner as to adversely affect the lawful uses of the water." *Id.*

[45] 43 U.S.C. §390b(d). The WSA authorizes not only the Corps, but also Reclamation, to include storage for M&I supplies as a project purpose.

[46] Proposed Rule, 81 Fed. Reg. at 91,556. The following section contains a summary of portions of the Proposed Rule, but does not address each provision.

[47] Office of Information and Regulatory Affairs, Office of Management and Budget, *View Rule: RIN: 0710-AA72*, REGINFO.GOV (last visited June 11, 2018), https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201804&RIN=0710-AA72.

[48] Proposed Rule, 81 Fed. Reg. at 91,556.

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] Consistent with the title of the hearing, this testimony focus on issues related to "surplus" water in the 1944 FCA rather than the Proposed Rule's relationship with the WSA.

[53] *Id.* at 91,560.

The Corps would define the terms "expansively" to include any Corps facility that impounds water and is capable of being operated for multiples purposes and objectives.[54] The Proposed Rule would also include parallel definitions of the terms "domestic and industrial uses" under Section 6 of the 1944 FCA and "municipal and industrial water supply" under the WSA.[55] According to the Corps, these terms would be defined to encompass all water-uses under an applicable water rights allocation system other than irrigation under 33 U.S.C. § 390.[56]

With regard to Section 6 of the 1944 FCA, the Proposed Rule would define "surplus water" as water available at any reservoir that the Assistant Secretary of the Army (Civil Works) determines is not required during a specified time period to accomplish authorized federal purposes for any of the following reasons: (i) the authorized purpose for which such water was originally intended has not fully developed; or (ii) the need for water to accomplish the authorized purpose has lessened; or (iii) the amount of water to be withdrawn, in combination with any other such withdrawals during the specified time period, would have virtually no effect on operations for authorized purposes.[57]

The Proposed Rule would also define the phrase "then existing lawful use" in Section 6 of the 1944 FCA to mean "uses authorized under a State water rights allocation system, or Tribal or other uses pursuant to federal law, that are occurring at the time of the surplus water determination, or that are reasonably expected to occur during the period for which surplus water has been determined to be available."[58]

Determining "Reasonable" Prices for Surplus Contracts

The Proposed Rule would modify the methodology by which the Corps determines a "reasonable" price for surplus water contracts under Section 6 of the 1944 FCA.[59] Currently, the Corps uses the same methodology to determine "reasonable" price for temporary surplus contracts under the 1944 FCA and permanent water storage under the WSA, except that the price is calculated on an annualized basis for temporary surplus contracts.[60] The WSA provides that "the cost of any construction or modification . . . section shall be determined on the basis that all authorized purposes served by the project shall share equitably in the benefits of multiple purpose construction . . . ."[61]

Under the approach in the Proposed Rule, the Corps would base the price of surplus water contracts on the following:

> the actual, full, separable costs, if any, that the Government would incur in making surplus water available during the term of the surplus water agreement, such as by administering and monitoring the contract, or by making temporary changes to reservoir operations to accommodate the surplus

[54] *Id.*

[55] *Id.*

[56] *Id. See also* 43 U.S.C. § 390.

[57] *Id.* at 91,589. Under existing Corps' guidance, surface water is defined as either:

> (1) water stored in a Department of the Army reservoir that is not required because the authorized use for the water never developed or the need was reduced by changes that occurred since authorization or construction; or (2) water that would be more beneficially used as municipal and industrial water than for the authorized purpose and which, when withdrawn, would not significantly affect authorized purposes over some specified time period.

ER 1105-2-100, *supra* note 20, at E-214.

[58] Proposed Rule, 81 Fed. Reg. at 91,589.

[59] *Id.* at 91,560.

[60] ER 1105-2-100, *supra* note 20, at E-115.

[61] 43 U.S.C. § 390b(b). For additional background and analysis of price-related provisions in the Proposed Rule, see Carter Memorandum, *supra* note 1, at 4-9.

> water withdrawals. The Corps expects that these costs would be small or nonexistent in most cases, since surplus water by definition is not needed for federal purposes, and typically would not require any operational changes.[62]

Under this change, the price would be based on the cost that can be identified as specifically associated with a surplus contract. For surplus water contracts where federal law provides that no charges may be assessed, such as in the WRRDA 2014,[63] the reasonable fee calculation would not apply.[64]

Combined Easement and Contract Documents

Under the Proposed Rule, the Corps would require a "combined easement and contract document" for all users of surplus water at a Corps reservoir.[65] The storage agreements authorized under the WSA and surplus contracts authorized under 1944 FCA often have been separate documents from the real estate approvals (e.g., easements) required for construction and operation of the intake facilities.[66] In 2008, the Corps updated its real estate policies to specify that easements supporting water supply agreements should not be issued before a water supply agreement had been executed.[67] But the Corps' internal audits revealed that withdrawals were still being allowed under approximately 1,600 real estate instruments.[68] Under the Proposed Rule, withdrawals that are occurring pursuant to easements without associated contracts would be reassessed when the easement expires or within five years of the effective date of the final rule.[69] The Corps states that the requirement for a combined document is expected to streamline the process for granting approval to withdraw surplus water and reduce administrative requirements.[70]

WSA-Related Provisions

In addition to changes to terminology and process for surplus water contracts under the 1944 FCA, the Proposed Rule addresses a number of issues that are entirely or predominately WSA-specific. These include:

- Formalizing and clarifying the Corps' position regarding when modifications to a reservoir require congressional approval because they would "seriously affect" original purposes or "involve major structural or operational changes . . .."[71]
- Requiring the Corps to consider return flows and other inflows made when determining storage allocations for water supply and the effects of operations for authorized purposes, and on the environment.[72]

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[62] Proposed Rule, 81 Fed. Reg. at 91,560.

[63] *See supra* § Additional Statutory Authorities and Restrictions.

[64] Proposed Rule, 81 Fed. Reg. at 91,560-61.

[65] *Id.* at 91,561.

[66] *See id.*. at 91,557 ("In many cases . . . the Corps has allowed water to be withdrawn from its reservoirs simply by means of an easement across federal project lands, without formal water supply agreements . . . ."). For additional background and analysis of easement-related provisions in the Proposed Rule, see Carter Memorandum, *supra* note 1, at 8-9

[67] *Id.* at 91,567.

[68] *Id.* at 91,583.

[69] *Id.* at 91,561.

[70] *See id.*

[71] *See* 43 U.S.C. §390b(d). *See* CRS Report R42805, *supra* note 1.

[72] Proposed Rule, 81 Fed. Reg. at 91,562.

- Mandating that the Corps incorporate storage accounting in all new WSA storage agreements in a way that makes clear how the Corps measures availability of water for withdrawal, as well as return flows.[73]
- Formalizing what the Corps describes as its prevailing practice of crediting return flows proportionally to all storage accounts rather than to the entity that is responsible for the inflow.[74]

Conclusion

The Proposed Rule addresses numerous issues that have arisen in the context of regulating water withdrawals from the Corps' reservoirs. While the legal and policy-based comments to the Proposed Rule are too varied to address in this testimony, several commentators have argued that the Proposed Rule infringes on states' rights over navigable waters within their borders.[75] In particular, these commentators argue that the definition of "surplus water" in the Proposed Rule violates a state's right to regulate the use of the "natural flow" of waters that would be available to the state regardless of whether the Corps' infrastructure were in place.[76]

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. The Corps' constitutional authority to manage its projects for a variety of authorized purposes is broad; Congress has delegated authority to the Corps to store water for M&I purposes and authorized it to charge for surplus water stored at certain projects.[77] But it may also be argued that the Corps' constitutional authority over water stored at its projects extends only to the amount of water necessary to meet the purposes of that project and not to any surplus water.[78] Such an argument, if asserted, may need to be reconciled with Supreme Court precedent recognizing generally broad Commerce Clause authority to regulate navigable waters for purposes of flood control, navigation, and other congressionally approved purposes.[79]

As a matter of statutory interpretation, it may be argued that, although Congress provided statutory authorizations to the Corps related to storage and sale of water stored in a Corps' reservoir, Congress also indicated deference should be made to state uses of the water, and that such deference should inform any interpretation of the Corps' authority under the 1944 FCA and WSA. Such an argument, however, potentially must address the fact that Congress did not include the same express limitations on federal power in the 1944 FCA and WSA that it included in the Reclamation Act, and that the Corps' statutory authority does not expressly include a limitation related to the "natural flow" of state waters.

[73] *Id.*

[74] Proposed Rule, 81 Fed. Reg. at 91,562.

[75] *See*, *e.g.*, Letter from Phillip C. Ward, Chairman, Western States Water Council to The Honorable Jo-Ellen Darcy, Ass't Sec. of the Army (Civil Works) (Aug. 6, 2013); Letter from Earl Lewis, President, Nat'l Water Supply Alliance to U.S. Army Corps of Eng'rs (Nov. 16, 2017).

[76] *See*, *e.g.*, Letter from Doug Burgum, Governor, State of North Dakota to U.S. Army Corps of Eng'rs (May 11, 2017).

[77] *See supra* § Statutory Authority Related to Water Storage at Corps' Projects.

[78] *See supra* § State Ownership of Water Within Its Boundaries.

[79] *See supra* § Constitutional Authority for Water Storage at Federal Water Projects.

Appendix.

Figure A-1. Photo and Biography

Stephen Mulligan, Legislative Attorney, Congressional Research Service

Biography

B.A., James Madison University; J.D., Loyola University Chicago School of Law. Member of the Virginia and District of Columbia bars.