

Testimony of Jeanne Goodman, PE
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to the
US Senate Subcommittee on Superfund, Waste Management and Regulatory Oversight

“Oversight of the U.S. Army Corps’ Management of the Missouri River”

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Chairman Rounds, Ranking Member Harris, and Members of the Committee, my name is Jeanne Goodman, Chief Engineer of the Water Rights Program, South Dakota Department of Environment and Natural Resources (DENR). Thank you for the opportunity to testify. I want to share DENR’s perspective of the Corps’ management of the Missouri River since the 2011 flood event, DENR’s efforts in managing water use of the Missouri River, and how federal and state management efforts need to work collaboratively.

Following the post 2011 Missouri River Flood Independent Review Report recommendations, the Corps began improving communication systems between other agency forecasts and distribution of current conditions, storage forecasts, and planned releases with federal, state, and local officials during periods of heightened flood risk. DENR appreciates the Corps improved communication especially during spring flows and runoff conditions through monthly conference calls. Updates of basin conditions posted on their website have been particularly helpful this year as early mountain snowmelt and late spring runoff impacted Lake Oahe levels resulting in variable flows in Lake Sharpe.

However, the Independent Review Report recommendations for studies to enhance data collection, forecasting, and runoff from plains snow, which was insufficient in preparing for and managing the 2011 flood, has not been implemented. This key piece

in flood management was authorized by the 2014 Water Resources Development Act, but the Corps needs to step up as lead agency to make this program happen.

Water Rights law in South Dakota dates back to statehood and declares all waters within the state as the property of the people of the state. The right to use the water may be acquired by appropriation as provided by law. Water right permits can be issued if there is unappropriated water available, the use will not unlawfully impair existing rights, the proposed use is beneficial, and is in the public interest. Meeting these criteria, water right permits are issued for use of the natural flows from the Missouri River. Natural flows are those waters that would flow in the river whether or not the main stem reservoirs existed.

The Corps, however, does not recognize natural flows or the state's jurisdiction over them. Instead they consider all water in a reservoir as stored water under federal authority. In 2008 the Corps issued Real Estate Guidance Policy Letter No. 26, a policy requiring municipal and industrial water users to acquire a water storage contract prior to the Corps issuing an access easement to a Missouri River reservoir for a pump site. Since the Corps ignores the existence of natural flows and had no process for issuing contracts, the effect of the policy was to place a moratorium on easements to Missouri River reservoirs. This moratorium hit South Dakota hard, because out of a thousand miles of Missouri River shoreline, only about one hundred are on two short free-flowing stretches in the state. Ninety percent of the river became off limits to potential users of Missouri River water.

How can South Dakotans put Missouri River water to beneficial use when access to the water is denied? We agree the Corps has certain authorities under the 1944 Flood Control Act and 1958 Water Supply Act but strongly dispute the Corps' definition of stored water as being all the water held in reservoirs. A proposed rulemaking published December 2016, intended to standardize how the Corps will charge for stored water and further define stored water versus natural flows, failed to fully recognize states' jurisdiction in the matter.

As Governor Daugaard commented on the proposed rulemaking, *“the proposed rule is unacceptable to South Dakota”* because the Corps *“attempts to write into rule the agency’s legal authority to expand federal storage right claims and control over the allocation of all of the Missouri River water without regard to state water laws....”*

States’ rights to natural flows of navigable waters within their borders are constitutionally founded, and protected, in the Equal Footing Doctrine. Congress acknowledged this states’ right in the first sentence of Section 1 of the 1944 Flood Control Act by stating *“...it is declared to be the policy of the Congress to recognize the interests and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control, ...”* As a consequence of the doctrine and the enacted law, the Corps must acknowledge the state’s right to natural flows for states to effectively manage Missouri River water. (Governor Daugaard’s complete comment letter the *“Use of Army Corps of Engineers Reservoir Projects for Domestic, Municipal & Industrial Water Supply”* proposed rulemaking is attached.)

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

1. Direct the Corps to follow through on the 2011 Missouri River Flood Independent Review Report by continuing basin updates for Congressional, state, and local interests and step up as lead agency to develop and implement a plains snowpack and drought monitoring network authorized by the 2014 WRDA.
2. Acknowledge that natural flows through the reservoirs exist and remain under the jurisdiction of the states by rescinding Real Estate Guidance Policy Letter No. 26 and allowing users to access the water for which they have obtained state water rights.
3. Reject the current proposed rulemaking *“Use of Army Corps of Engineers Reservoir Projects for Domestic, Municipal & Industrial Water Supply”*.

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