
June 6, 2018

The Honorable R.D. James
Assistant Secretary for the Army for Civil Works
U.S. Army Corps of Engineers
441 G Street, N.W.
Washington, D.C. 20314

Dear Assistant Secretary James:

We are writing to express the continued concerns of Western Governors regarding the U.S. Army Corps of Engineers' proposed rulemaking, Policy for Domestic, Municipal, and Industrial Water Supply Uses of Reservoir Projects Operated by the Department of the Army, U.S. Army Corps of Engineers ([RIN 0710-AA72](#), [Docket ID: COE-2016-0016](#)). The proposed rule, which would affect Corps water reservoir projects located in western states, threatens to interfere with those states' primary authority to manage and allocate water resources within their boundaries. [The Spring 2018 Unified Agenda of Regulatory and Deregulatory Actions](#) schedules "Final Action" on the proposed rule for January 2019 and "Final Action Effective" for March 2019. It remains unclear to Western Governors how the Corps plans to engage with, and respond to, states as it moves forward in its rulemaking process.

On December 16, 2016, the Corps issued a [Notice of Proposed Rulemaking](#) (NPRM) to address its policies governing the use of Corps reservoir projects within the Upper Missouri River Basin and the treatment of "surplus water" within that system. In response to the NPRM, the Western Governors' Association (WGA) submitted [comments](#) expressing concerns about both the substance of the proposed rule and the process by which it had been developed.

Specifically, the Governors' comments cited: (i) the Corps' failure to conduct adequate consultation with potentially-affected states, or to include a proper assessment of the proposed rule's potential federalism implications as required by Executive Order 13132, Federalism; (ii) the various potential preemptive effects of the proposed rule on state authority over water resources; (iii) the Corps' overly-broad definition of the term "surplus waters" to include natural, historic river flows over which states possess primary legal authority; and (iv) the denial of, or interference with, access to Corps projects for the lawful diversion and appropriation of water under state law. Several other western states also submitted [comments](#) to the Corps in response to its NPRM, largely reiterating and expanding upon the concerns expressed by WGA.¹

¹ Western States that submitted comments to the Corps in response to the NPRM 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](#).

Western Governors' concerns regarding this issue were initially raised in an August 21, 2013 letter to then-Assistant Secretary of the Army (Civil Works) Jo-Ellen Darcy. We cited the Corps' failure to adequately engage with states in its then-pending rulemaking relating to surplus waters. Similarly, on August 6, 2013, the Western States Water Council (WSWC) sent a letter to Assistant Secretary Darcy citing shortcomings in the rulemaking process and a lack of regulatory clarity on several critical implementation issues. Western Governors are 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, or incorporated in, the Corps' decision-making processes in the development of the proposed rule.

States have an historic and unique relationship with the Corps and a vital role in the implementation of several Corps programs, due to states' inherent and sovereign authority over water resources, as well as their statutory role as co-regulators under the federal Clean Water Act. As stated in WGA Policy Resolution [2017-01](#), *Building a Stronger State-Federal Relationship*, federal agencies "should be required to 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."

In its 2016 NPRM, the Corps states that the proposed rule is "intended to enhance the Corps' ability to cooperate with state and local interests in the development of water supplies in connection with the operation of its reservoirs," and that it "endeavors to operate its projects for their authorized purposes in a manner that does not interfere with the States' abilities to allocate consumptive water rights, or with lawful uses pursuant to State, Federal, or Tribal authorities." As of this date, the Western Governors are unaware of any meaningful outreach on the part of the Corps to engage with states – or respond to their expressed concerns – as part of this rulemaking effort.

Western Governors have a history of responsibly exercising their authority for comprehensive water management within their states and of working cooperatively with various federal agencies in connection with that responsibility. We reiterate our concerns about the Corps' proposed rule, as described in its NPRM, for the following reasons:

- Western Governors continue to believe that the proposed rule does, in fact, have federalism implications which trigger the expanded state consultation requirements of Executive Order 13132.
- As the primary authority over water management and allocation within their borders, states must not be required to relinquish or subordinate their sovereign authority over the natural flows of rivers impounded by the Corps or any other federal agencies.
- Legally, the Corps must define "surplus water" to expressly exclude natural flows (and any quantification of such flows) which would have occurred without the development of federal water projects. Natural flows must remain subject to states' authority to allocate water resources for beneficial uses.

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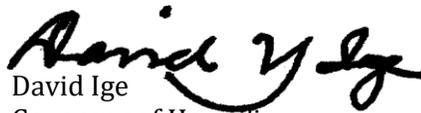
- The Corps should not deny, or interfere with, access to divert and appropriate natural flows (*i.e.*, water which would have been available without the construction of Corps impoundments) in its reservoir projects. Similarly, the Corps should not charge storage fees to water users where such users are making withdrawals of natural flows within Corps reservoirs.

Western Governors strongly urge you to engage in meaningful, substantive, and ongoing consultation with states before moving forward with any efforts to develop the proposed rule and to respond to our consistently expressed concerns regarding this matter.

Sincerely,



Dennis Daugaard
Governor of South Dakota
Chair, WGA



David Ige
Governor of Hawai'i
Vice Chair, WGA