



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS
441 G STREET, NW
WASHINGTON, DC 20314-1000

MAY 14 2020

The Honorable Kevin Cramer
United States Senate
400 Russell Senate Office Building
Washington D.C. 20510

Dear Senator Cramer:

I hope that you, your family, and your constituents are faring well during these trying times. Thank you for your letter of May 13, 2020, which outlines some of your concerns about previous practices of the U.S. Army Corps of Engineers (Corps) with regard to water rights, particularly in the Western states. I appreciate the opportunity to further clarify some of the topics that you and I have discussed in the past. Your commitment to the residents of North Dakota and other Western states is evident in the way you tirelessly champion the issues important to them, including the complex topic of State water rights.

I am writing to you today as the nominee to be the 55th Chief of Engineers for the Corps. However, my perspective is understandably shaped by the insights I have gained while serving as the Deputy Commanding General for Civil and Emergency Operations, as well as the Commanding General for the Northwestern Division. Over the past five years, I have learned more than I would have imagined regarding the complex issues surrounding the Nation's water supply, and appreciate this opportunity to outline my viewpoints.

As you are aware, the Corps withdrew its proposed water supply rule after additional consultation with States and Tribes. We have continued to engage stakeholders and recognize the importance of consulting with States and Tribes before undertaking any future decision-making in this area. If confirmed as the next Chief of Engineers, I would certainly encourage a continued dialogue at all levels; with Congress, the States, Tribes, and local partners. What has become clear to me is that this process moving forward cannot be accomplished in isolation, and must be a collaborative effort so that all parties are heard and their needs considered.

As the current Deputy Commanding General for Civil Works, I have been afforded the opportunity to observe, from a national perspective, the complex and sometimes competing priorities associated with water rights. What is apparent is that there is no one size fits all solution. If confirmed, I would endeavor to ensure that the Corps strives for a sensible approach, aligning its principles and practices with regard to water rights with the interests of the users and in accordance with the law. The needs of North

Dakota are not the same as those in California, and it is my belief that the Corps needs to adapt accordingly (and quickly) to apply effective practices across the country.

The withdrawal of the water supply rule affords the Corps an opportunity to further evaluate the application of the Flood Control Act of 1944 (FCA), Water Supply Act of 1958 (WSA), and associated internal policies. In your letter you asked some specific questions, which I have included for context, along with my responses, immediately afterward.

Pertaining to the FCA:

- a) Do you agree domestic, municipal, stock water, irrigation, mining, and industrial uses that do not interfere with flood control operations have priority over other uses of water stored in project reservoirs in states lying wholly or partly west of the 98th meridian?

I agree that the operation of Corps reservoirs for navigation shall not interfere with the uses provided in Section 1. If confirmed, I would work to ensure that the Corps recognizes the State-issued rights, and operates its reservoirs to avoid interference with those uses.

- b) Do you agree State officials should make the determination of whether navigation uses conflict with any current or future beneficial consumptive uses of water for domestic, municipal, stock water, irrigation, mining, or industrial purposes under state law in states lying wholly or partly west of the ninety-eighth meridian?

I agree that the determination of whether navigation uses conflict with current or future beneficial consumptive uses must take into account - and defer to - the states' determination of lawful uses. If confirmed, I commit to working with the Secretary of the Army in partnership with the states to determine how to construct and operate the projects authorized under the Flood Control Act.

- c) Do you agree with Colonel Schaufelberger's statement to the Senate EPW Committee on October 1, 1993 (141 Congressional Record S3744-04, 1995 WL 96658) that the O'Mahoney-Milliken amendment (Section 1(b) of the FCA) specifies that consumptive use has priority over other purposes?

I agree that Section 1(b) of the 1944 FCA specifies that the use of waters in Corps reservoir projects west of the ninety-eighth meridian for navigation shall not conflict with any beneficial consumptive use.

- d) Do you agree the USACE's flood control operations should not be allowed to conflict with any beneficial consumptive uses of water for domestic, municipal, stock water, irrigation, mining, or industrial purposes under state law in states lying wholly or partly west of the ninety-eighth meridian?

I agree that the Corps' flood control operations should not interfere with any beneficial consumptive uses of water west of the ninety-eighth meridian. If confirmed, I commit to working with water supply users and the Assistant Secretary of the Army (Civil Works) who has retained decision authority for those requests that may impact flood storage.

- e) Do you agree Section 6 of the FCA does not grant the USACE authority to "sell" water?

I agree that Section 6 does not authorize the Corps to sell water.

- f) Do you agree the USACE's authority to store "surplus water" under Section 6 of the FCA is limited to retaining water impounded for project purposes but subsequently determined to be "surplus" to project purposes?

Congress did not define the term "surplus water" in the 1944 FCA. I agree that the Corps has traditionally understood "surplus water" to have the meaning you described in your letter. We learned during the water supply rule public comment period that some States, Tribes, Water Supply Associations and other stakeholders prefer a more specific definition. If confirmed, I would propose the following definition for "surplus water" as a starting point for moving forward in this conversation:

- Water that does not impact a current or future State water right
- Water that does not impact a current or future Tribal water right
- Water that does not impact congressionally authorized purposes of the Federal project

- g) Do you agree State officials should make the determination of whether the USACE's exercise of its authority under Section 6 of the FCA conflicts with any current or future beneficial consumptive uses of water for domestic, municipal, stock water, irrigation, mining, or industrial purposes under state law in states lying wholly or partly west of the ninety-eighth meridian?

I agree that the Corps cannot enter into any contract under Section 6 that would conflict with current or future beneficial consumptive uses, as determined by the States. If confirmed, I would commit to a continued partnership with the Secretary of the Army to provide technical direction to that effect.

- h) Do you agree the USACE has historically implemented Section 6 of the FCA through the use of access agreements rather than water supply contracts?

Historically, the Corps has issued easements for water withdrawals, primarily at Missouri River Mainstem Reservoir projects. However, Corps practices have been inconsistent in this regard. If confirmed, I would work to ensure that the Corps clarify that most withdrawals associated with Corps-issued easements at Missouri River Mainstem Reservoir projects could be authorized under Section 6, without execution of a separate contract, and without charge. It is my understanding that the Corps, has no mechanism for charging for those withdrawals, and could not charge for those withdrawals even if Section 6 contracts were found to be required. If confirmed, I would seek to assure users that the Corps has no intention of charging for or interfering with those withdrawals.

- i) If you become Chief of Engineers, how will you implement Section 6 of the FCA?

If confirmed, I would apply Section 6 consistent with current law and Congress's expressed intent in partnership with the States. I would work proactively to partner with the Assistant Secretary of the Army for Civil Works to ensure policy guidance is revised to meet that objective.

To date, the Corps sought and received relief from the requirement to develop a national water supply rule which was inhibiting progress and effective dialogue, particularly on the Missouri River Basin. The Corps also requested and received relief of the requirement for approved Surplus Water Reports for the six Missouri River Mainstem Reservoirs. These reports were previously a pre-requisite for entering into Section 6 Surplus Water Contracts. Finally, the Corps requested and received delegation authority for entering into Surplus

Water contracts from the Assistant Secretary of the Army (Civil Works) and is in the process of disseminating implementation guidance to the field. If confirmed you have my commitment to continue these efforts, seeking and executing improvement to the Corps water supply program.

Questions pertaining to the WSA:

- a) Do you agree that by enactment of Section 390(a) of the WSA, Congress intended to recognize the States' primary role in developing water supplies for domestic, municipal, industrial, and other consumptive uses?

I agree that Section 301(a) of the WSA, 43 U.S.C. 390b(a), recognizes the primary role of States in developing water supplies for domestic, municipal, industrial, and other purposes.

- b) Do you agree the WSA only grants the Corps authority to contract for the use of reservoir storage space for purposes enumerated in Section 390(b) [390b(a)]?

I agree that Section 301(b) of the WSA, 43 U.S.C. 390b(b), authorizes the Corps to enter into contracts for the use of storage space for enumerated water supply purposes. That section also authorizes the Corps to include water supply storage in the plans for new federal reservoirs.

- c) Do you agree that the WSA does not grant the Corps authority to sell water?

I agree that the WSA does not authorize the Corps to sell water.

- d) Do you agree that the water supply contracts must comply with Section 1 of the FCA and Section 8 of the 1902 Reclamation Act, both of which clearly delineate state water appropriation authority?

I agree that the Corps must comply with Section 1 of the FCA, and that water supply contracts at Corps reservoirs must be consistent with state water appropriation authority. My understanding is that Section 8 of the 1902 Reclamation Act has played a distinguished role in the flourishing of the West, by harmonizing the mandate of the Bureau of Reclamation to supply irrigation and municipal and industrial water with state law. However, my understanding is that law does not generally apply to Corps reservoirs, which are constructed and operated under a different statutory framework. The Corps does not deliver water and does not obtain state water rights, but rather contracts for the

use of storage by holders of state water rights, thereby complying with Section 1 of the FCA.

Additionally, Section 8 of the FCA, codified at 43 U.S.C. 390, provides for the use of storage in Corps reservoirs for irrigation purposes, subject to the approval of the Secretary of the Army and the authorization by Congress of specific irrigation works to be constructed by the Department of the Interior. The Bureau of Reclamation, not the Corps, would enter into contracts for the delivery of irrigation water pursuant to that authority. Finally, 43 U.S.C. 390 authorizes the Corps to enter into contracts for the interim use for irrigation purposes of storage in a Corps reservoir previously allocated to municipal and industrial water supply. In the rare cases where those circumstances exist - not applicable at the Missouri River Mainstem Reservoirs - the Corps would only enter into contracts with users who hold State-issued irrigation water rights.

- e) If you become Chief of Engineers, how will you implement the provisions of the WSA?

If confirmed, I would apply the WSA consistent with current law and Congress' expressed intent in partnership with the States. I would work proactively to partner with the Assistant Secretary of the Army for Civil Works to ensure that practicable policy guidance is established and followed.

Questions pertaining to Real Estate Policy Guidance Letter No. 26 (PGL 26):

First, I want to acknowledge the frustration you shared in your letter regarding the amount of time it took the Corps to render an approved Surplus Water Contract for Select Energy Services in North Dakota. In November 2018, the Assistant Secretary of the Army (Civil Works), out of growing concerns for flood control, elevated decision authority on all water-supply related agreements to his level. The reviews of our proposals received even greater scrutiny following the devastating flood events on the lower Missouri River basin in early 2019. We have since worked with the Secretary's office in a detailed review of our process to ensure flood control operations are not impacted by these contracts, and he has returned decision authority to the Corps.

- a) Has the Corps established the single, searchable database instructed under this order and has this guidance document been posted there?

The Corps is working diligently with partner offices in the Administration to determine which documents are subject to Executive Order 13891. To date, the Corps has submitted 3,965 documents for the Administration's review,

including PGL 26). If confirmed, you have my commitment to work within the Administration to fulfill the requirements of the Executive Order. I believe it is incumbent upon the Corps to provide clear guidance on policy, specifically when there are changes, and affording easy access to the public by placing guidance documents on a single database would be a critical first step. Specific to PGL 26, the Corps is actively working to include this document with other Corps guidance documents to be accessible on the Department of Defense public website.

- b) Has or is the Corps reviewing this document for consistency with applicable law to determine if it should be rescinded or modified?

Real Estate Policy Guidance Letter 26 was issued in 2008 in coordination with the Assistant Secretary of the Army for Civil Works. I recognize the misunderstanding it has caused, and if confirmed, I am committed to working with the Assistant Secretary's office to produce understandable and equitable guidance, tailored to the needs of the water supply users.

- c) Do you agree the Corps has historically implemented Section 6 of the FCA through the use of access agreements rather than water supply contracts?

Historically, the Corps has issued easements for water withdrawals, primarily at Missouri River Mainstem Reservoir projects. However, as I have shared with you previously, our practices have been inconsistent in this regard. If confirmed, I would work to ensure that the Corps clarify that most withdrawals associated with Corps-issued easements at Missouri River Mainstem Reservoir could be authorized under Section 6, without execution of a separate contract, and without charge. If confirmed, I would seek to assure users that the Corps has no intention of charging for or interfering with those withdrawals.

- d) President Trump has created a venue for the USACE to amend, if not fully repeal, this flawed guidance. Will you commit to its withdrawal?

The decision to withdraw the rule is not one that is within my sole authority but rather in conjunction with our partners in the Administration. If confirmed, you have my commitment to ensure that any route which is taken addresses the concerns of both you and those you represent. Further, I am committed to continuing to build a partnership with all stakeholders involved in this process. I believe the biggest lesson learned is that the Corps can do better to communicate and execute policy and guidance in relation to the FCA and WSA. If confirmed, I would work tirelessly to ensure these goals are realized.

Sir, thank you for this opportunity to address these important questions, and I look forward to continuing our dialogue and implementing practicable solutions to benefit the Nation.

Sincerely,

A handwritten signature in black ink, appearing to read "Scott A. Spellmon". The signature is fluid and cursive, with a long horizontal line extending to the right.

Scott A. Spellmon
Major General, U.S. Army
Deputy Commanding General
for Civil and Emergency Operations