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August 22, 2019

The Honorable Donald J. Trump
President of the United States
The White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

The Honorable Mick Mulvaney
Director
Office of Management and Budget
725 17th Street NW
Washington, D.C. 20503

RE: COE-2016-0016 – Use of U.S. Army Corps of Engineers, Reservoir Projects for Domestic, Municipal & Industrial Water Supply

Dear President Trump and Director Mulvaney:

The Attorneys General of North Dakota, Idaho, Alaska, Arizona, Colorado, Montana, New Mexico, Oregon, South Dakota, Utah, Washington and Wyoming request that you direct the Corps of Engineers (“Corps”) to: (1) withdraw its proposed “Water Supply Rule”; and (2) comply with federal statutes that expressly require the Corps to abide by state law in allocating water from Corps reservoirs for consumptive uses.

In the “Water Supply Rule” (“Rule”), the Corps seeks “to update and clarify its policies governing the use of its reservoir projects pursuant to Section 6 of the Flood Control Act of 1944 and the Water Supply Act of 1958.” 81 Fed. Reg. 91556. The “policies” of the Rule, however, are directly contrary to the express congressional policy declarations in these same statutes. In both the Flood Control Act of 1944 and the Water Supply Act of 1958, Congress specifically and unambiguously declared that the Corps’ water supply operations are subject to state law. If allowed to take effect, the Rule would effectively override these express congressional declarations, usurp the States’ exclusive authority to guide their water allocation and development, and eviscerate cooperative federalism principles that Congress has expressly and repeatedly reaffirmed.

Both the Flood Control Act of 1944, 58 Stat. 887 (“FCA”), and the Water Supply Act of 1958, 72 Stat. 319 (“WSA”), expressly incorporate Congress’ historic policy of “purposeful and continued deference to state water law” *California v. United States*, 438 U.S. 645, 653 (1978). The first section of the FCA is a “Declaration of Policy,” which states “. . . it is hereby 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” 43 U.S.C. § 701-1.

Similarly, the first section of the WSA states “[i]t is 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” 43 U.S.C. § 390b(a). The WSA further specifies that it “shall not be construed to modify the provisions” of the FCA’s “Declaration of Policy,” or the provisions of the Reclamation Act of 1902, 43 U.S.C. § 390b, which requires that the “control, appropriation, use, or distribution of water for irrigation” must “proceed in conformity with [state] law.” 33 U.S.C. § 383.

The intent of these provisions could not be clearer. They require the Corps when exercising its authority under the WSA and Section 6 of the FCA to supply water from Corps reservoirs for domestic, municipal, and industrial (“DMI”) uses to defer to state law with respect to “the development of the watersheds within [state] borders,” “water utilization and control,” and “developing water supplies for domestic, municipal, industrial, and other purposes.” 33 U.S.C. § 701-l(a); 43 U.S.C. § 390b(a). Indeed, the

Senate Committee on the WSA stated “that [the Water Supply Act] prescribes a sound division of water supply responsibility between the Federal Government and State and local interests by declaring it to be the policy of Congress to recognize the primary responsibilities of the States and local interests in developing water supplies for domestic, municipal, and other purposes.” S. Rep. No. 1710 (85th Cong., 2d Sess.) (Jun. 14, 1958) at 132-33.

The Supreme Court confirmed this interpretation of the congressional “policy” of the FCA in the *California* decision. In that case the Court reviewed in detail “the consistent thread of purposeful and continued deference to state water law by Congress.” 438 U.S. at 653. The Court determined this policy was motivated principally by congressional concerns about “the legal confusion that would arise if federal water law and state water law reigned side by side in the same locality.” *Id.* at 668-69. The Court also relied on one of its previous decisions, in which the Court stated there are only “two limitations to the States' exclusive control of its streams”: federal “reserved rights” for government property, and “the navigation servitude.” *Id.* at 662 (quoting *United States v. Rio Grande Dam & Irr. Co.*, 174 U.S. 690, 703 (1899)). The Court “was careful to emphasize” that outside of these two exceptions, “the State has total authority over its internal waters. ‘Unquestionably the State ... has a right to appropriate its waters, and the United States may not question such appropriation, unless thereby the navigability of the [river] be disturbed.’” *Id.* (quoting 174 U.S. at 709) (brackets and ellipsis in original). The Court interpreted the congressional “policy” of the FCA as confirming rather than undermining these principles. *Id.* at 678.

The FCA goes even further in deferring to water laws of the western states, by eliminating or significantly circumscribing “the navigation servitude” exception to “total” and “exclusive” state control over consumptive beneficial uses of the state's water. *Id.* at 662. The FCA's “Declaration of Policy” states that “[t]he use for navigation” of waters arising in the States wholly or partly west of the ninety-eighth meridian “shall only be such use as does not conflict with any beneficial consumptive use, present or future, . . . of such waters for domestic, municipal, stock water, irrigation, or mining purposes.” 33 U.S.C. § 701-l(b).

These congressional directives reflect the fact that supplying water from a Corps reservoir for consumptive beneficial uses pursuant to the WSA

and Section 6 of the FCA is distinct from its operations “to regulate navigation and navigable waters.” 81 Fed. Reg. 91563. Federal law precludes the Corps from exercising its authority to supply water for DMI uses under the WSA and Section 6 of the FCA in ways that interfere with or usurp the States’ exclusive authority to allocate water under state water laws and water rights.

All these principles are recognized, to some degree, in the “supplementary information” the Corps provided in connection with the Rule. 81 Fed. Reg. 91556. The “supplementary information,” however, would not be controlling. The language of the Rule itself is what matters. And it is within the legal and policy context discussed above that the validity of the proposed Rule must be evaluated. Measured against these legal principles and congressional policy declarations, there is no doubt that the Rule exceeds the Corps’ authority, contravenes congressional policy, and seeks to usurp the States’ power to control the allocation and distribution of their waters. For example:

1. The Rule purports to resolve the “questions” the Corps perceives “as to what uses are covered” by the terms domestic, municipal, and industrial. 81 Fed. Reg. 91569. While the Corps admits that state “prerogatives” to make such beneficial use determinations must be “protected,” 81 Fed. Reg. 91560, the Rule tramples on these prerogatives by unilaterally declaring that domestic, municipal, and industrial uses of water include “*any* beneficial use” and “*all* uses of water,” other than irrigation. 81 Fed. Reg. 91569, 91575 (emphasis added). Worse, the Corps’ justification for this overreach—that different States have different definitions of domestic, municipal, and industrial uses of water—is the very reason that Congress has consistently required federal agencies to defer to state water law, as the Supreme Court recognized: “A principal motivating factor behind Congress’ decision to defer to state law was thus the legal confusion that would arise if federal water law and state water law reigned side by side in the same locality.” 438 U.S at 667, 668-69.
2. The Rule’s limited interpretation of its “[r]elation to State … water rights” would impermissibly allow the Corps to preclude future water development and beneficial uses of water under state water law and water rights. The Rule limits the Corps’ exercise of Section 6 or WSA authority only with respect to “*then-existing* State water rights,” 81 Fed

Reg. 91590 (emphasis added), which allows the Corps to interfere with uses under *future* state water rights. But the congressional policy of FCA Section 6 and the WSA prohibits the Corps from adversely affecting any *additional* development or use of water resources that may occur pursuant to state law. *See* 33 U.S.C. § 701-l(a) (declaration of congressional policy “recogniz[ing] the interests and rights of the States *in determining the development of the watersheds within their borders*”) (emphasis added); 43 U.S.C. § 390b(a) (declaration of congressional policy recognizing “the primary responsibilities of the States and local interests *in developing water supplies for domestic, municipal, industrial, and other purposes.*”) (emphasis added). These principles govern in western states even if FCA Section 6 and the WSA are characterized as an exercise of the federal constitution's Commerce Clause authority “to regulate navigation and navigable waters.” 81 Fed. Reg. 91563; *see also* 33 U.S.C. § 701-l(b) (“The use for navigation of waters arising in the [western] States . . . shall only be such use as does not conflict with any beneficial consumptive use, *present or future*, in [such] States . . . of such waters for domestic, municipal, stock water, irrigation, or mining purposes”) (emphasis added). In short, the provision of the Rule addressing its “[r]elation to State . . . water rights,” 81 Fed. Reg. 91590, conflicts with the explicit congressional policy of deference to state water laws and state water rights that circumscribes the Corps' FCA Section 6 and WSA authority. The provision is also inconsistent with the United States Supreme Court's policy interpretation in the *California* decision, and even the Corps' own policy interpretation in the Rule's “supplementary information” preamble. 81 Fed. Reg. 91556-88.

3. The Rule in addressing its “[r]elation to State . . . water rights” provides that the Corps “shall not . . . become, by virtue of any agreement executed pursuant to [FCA Section 6 or the WSA], a party to any water rights dispute.” 81 Fed. Reg. 91590. This blanket provision is contrary to the McCarran Amendment, which waives the sovereign immunity of the United States in state court suits “for the adjudication of rights to the use of water of a river system or other source” or “for the administration of such rights” when “the United States is a necessary party.” 43 U.S.C. § 666. Congress has never exempted the Corps from the McCarran Amendment and has never authorized the Corps to promulgate rules interpreting the McCarran Amendment or excluding itself from the McCarran Amendment. The Rule cannot override the unambiguous

language and intent of the McCarran Amendment, and the Corps cannot unilaterally immunize itself from a McCarran lawsuit. If a state court presiding over a McCarran lawsuit deems the Corps to be a “necessary party” to a lawsuit for water rights “adjudication” or “administration,” then the Corps can be joined as a party to the lawsuit despite the Rule’s contrary provision.

4. The Rule’s declaration that the Corps “shall not obtain water rights” for its water supply operations pursuant to the WSA and FCA Section 6, 81 Fed. Reg. 91590, would unilaterally excuse the Corps from complying with any state law requirement of obtaining a water right to store water for DMI uses. This would fly in the face of the FCA and WSA congressional policy, the *California* decision, and the plain language of the McCarran Amendment. Even if it is assumed that the Corps is correct in asserting that it need not obtain state water rights for its flood control, hydropower, and navigation operations, 81 Fed. Reg. 91563, storing water in a Corps reservoir for consumptive beneficial uses under the WSA and FCA Section 6 is not the same thing as operating the reservoir for non-consumptive flood control, hydropower, and navigation purposes under other statutory authorities. Further, the Corps’ assertions that it need not obtain water rights simply because the Corps does not use the DMI water and does not seek title to the water itself, 81 Fed. Reg. 91559, 91563-64, 91589, ignores the laws of many states, especially western states. Under the water law of most western states, a water right is purely a right of use that does not convey title to the water itself (which typically is held by the State), and reservoir operators usually must obtain water rights even if they do not actually use the stored water, but rather allocate or contract it to those who do. The FCA and WSA policy declarations are clear that Congress intended the Corps to be subject to such state water law requirements. 33 U.S.C. § 701-l(a); 43 U.S.C. § 390b(a).
5. The Rule provides that “appropriate mechanisms” of accounting for “available water supply storage” will be included in the Corps’ water supply agreements. 81 Fed. Reg. 91589. The Rule also purports to establish an accounting “principle” that “all inflows to and losses from the Corps reservoir are charged or credited proportionately to each water supply account.” *Id.* But in many States, and especially the western States, accounting for “water supply storage” in a reservoir, including the “inflows to and losses from” a reservoir, is a determination that is

controlled by state water rights and state laws defining how the available water supply is to be distributed. The Rule's so-called "appropriate mechanisms" and "principles" of water accounting contravene explicit congressional policy requiring the Corps to defer to state law regarding the nature, definition, and administration of state water rights when exercising its authority under the WSA and FCA Section 6. 33 U.S.C. § 701-l(a); 43 U.S.C. § 390b(a). The Rule usurps the States' authority to distribute water pursuant to state water rights and is contrary to States' sovereign authority to determine the use, distribution and development of their water resources.

6. The Rule is based in part on the Corps' theory that there is no meaningful distinction between "natural flow" and "stored water." 81 Fed. Reg. 91565. This distinction is often crucial to distributing water under state water rights and state law, however, particularly in the western States. By ignoring or minimizing the important distinction between natural flow and stored water, the Rule presumes the Corps has legal authority to allocate and distribute all the water that happens to flow through a Corps reservoir. This assumption is contrary to the water law of many states for reasons discussed above. It also disregards private property rights. State water rights are often property rights, particularly in the western states. By asserting legal control over all water that flows through a Corps reservoir, the Rule necessarily asserts control over inflows encumbered by downstream senior water rights —that is, "natural flow" the Corps has no right to store or allocate. This works a "taking" of private property rights that have been duly established under state law.

The preceding discussion is illustrative rather than exhaustive. All the above conflicts, and more, are documented in attached comments submitted by the Western Governors' Association and the Western States Water Council, on behalf of the governors of 18 western states. The comments conclusively demonstrate that the proposed Water Supply Rule exceeds the Corps' statutory authority, contravenes the McCarran Amendment and the express congressional policy declarations in the FCA and WSA, usurps the States' authorities to guide and control the allocation, distribution, and development of their water resources, and undermines historic cooperative federalism principles. If implemented, the Rule will result in precisely the type of legal confusion Congress has consistently sought to avoid through its

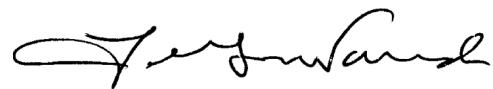
longstanding policy of deference to state law in the allocation and distribution of water.

We respectfully request that the Water Supply Rule be withdrawn, and the Corps be instructed to comply with state water laws in the exercise of its authority under the WSA and FCA Section 6. We stand ready to engage with the Corps in a collaborative government-to-government discussion on how to address our respective interests.

Sincerely,



Wayne Stenehjem
Attorney General of North Dakota



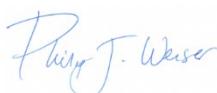
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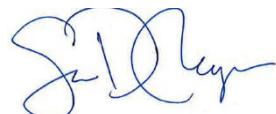
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