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## A Contentious Mission: Water Supply and Corps of Engineers Reservoirs

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# A CONTENTIOUS MISSION: WATER SUPPLY AND CORPS OF ENGINEERS RESERVOIRS

REED D. BENSON\*

*The U.S. Army Corps of Engineers operates hundreds of multi-purpose reservoirs nationwide, many of which provide water for municipal and industrial purposes. Demands for water from Corps reservoirs are sure to grow, and Congress has ordered the Corps to report on whether water supply should become a primary mission of the agency. The Corps has experienced controversy over water supply decisions, including disputes involving its Missouri River reservoirs and Lake Lanier in Georgia. When the Corps proposed a national Water Supply Rule in 2016, it drew significant opposition, forcing the agency to withdraw the rule and reassess its policies. This article summarizes the Corps' existing authorities and practices on water supply, reviews the issues raised by the proposed rule, and analyzes a legal dispute over control of water within Corps reservoirs. It then examines key policy issues the Corps must address in carrying out its water supply mission, ensuring that state and tribal interests, environmental concerns, public input, and the impacts of climate change are adequately considered.*

## I. INTRODUCTION

The U.S. Army Corps of Engineers (the Corps) has been called “the most significant player in United States water management”<sup>1</sup> because of its nationwide array of major multi-purpose reservoirs.<sup>2</sup> The

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2. See Abrams (describing the scope and diversity of the Corps' projects).

Corps is the federal agency responsible for flood control, and it claims that its projects prevented an annual average of \$138 billion in flood damages from 2010-19.<sup>3</sup> With about 375 multi-purpose reservoir projects,<sup>4</sup> the Corps also helps satisfy America's appetite for electricity (as the #1 generator of hydropower)<sup>5</sup> and flatwater recreation.<sup>6</sup> And although many of these reservoirs also provide water supply, slaking the nation's thirst for drinking water has never been a primary Corps mission . . . but that may change.

Congress has directed the Corps to report by mid-2022 on "the benefits and consequences of including water supply and water conservation as a primary mission of the Corps of Engineers in carrying out water development projects."<sup>7</sup> This report must not only list Corps projects where water supply is already a Congressionally-authorized purpose, but also identify existing reservoirs where water supply could become a new purpose.<sup>8</sup> Congress also called for the agency to provide "any recommendations . . . relating to including water supply and water conservation as a primary mission of the Corps of Engineers."<sup>9</sup>

Such an expansion of the Corps' mission to supply more municipal and industrial (M&I) water would be controversial, especially as to existing projects. Reallocating some portion of finite reservoir space to water supply would effectively leave less water available for other purposes such as hydropower, recreation, and downstream ecosystems. Such a dispute over M&I water supply from the Corps' Lake Lanier, on the Chattahoochee River near Atlanta, led to over 20 years of fierce

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3. The Corps further claims that its flood-control projects result in \$12.00 of avoided damages for each dollar spent. *Dam Safety Facts and Figures*, U.S. ARMY CORPS OF ENG'RS, <http://www.usace.army.mil/Media/Fact-Sheets/Fact-Sheet-Article-View/Article/2523036/usace-flood-damage-reduction-projects-avoid-1200-of-damages-for-each-100-invest> (Mar. 3, 2021).

4. INST. FOR WATER RES., U.S. ARMY CORPS OF ENG'RS, STATUS AND CHALLENGES FOR USACE RESERVOIRS 2 (2016) (hereinafter STATUS AND CHALLENGES). The Corps' own sources give widely varying numbers for its projects; as one explains, "Counts of Corps projects often vary due to the diversity of dam and reservoir projects." *Id.* at 2 n.3.

5. The Corps claims to generate one-fourth of all U.S. hydropower and to be the fifth largest supplier of electricity in the nation. *Hydropower Program*, U.S. ARMY CORPS OF ENG'RS, <https://www.usace.army.mil/Missions/Civil-Works/Hydropower/> (last visited July 7, 2021).

6. The Corps claims that its 420 lakes in 43 states attract 360 million visits a year – "one out of every ten Americans" – and host a third of all freshwater lake fishing in the country. U.S. ARMY CORPS OF ENG'RS, *Recreation Value to the Nation* 5, [https://www.iwr.usace.army.mil/Portals/70/docs/VTN/VTNRecreationBro\\_lores.pdf](https://www.iwr.usace.army.mil/Portals/70/docs/VTN/VTNRecreationBro_lores.pdf) (2008).

7. Congress required the report within 18 months of enactment of a giant multi-subject bill enacted near the end of 2020, which included the Water Resources Development Act of 2020 as Division AA. Pub. L. 116-260, Div. AA, § 221(a) (Dec. 27, 2020).

8. *Id.* § 221(b)(1)–(2).

9. *Id.* § 221(b)(5).

litigation involving the States of Alabama, Florida, Georgia and others.<sup>10</sup>

Expanding the Corps' water supply mission would also bring policy and political battles over the proper role of the Corps in relation to states, which closely guard their authority over water allocation and management. The western states are especially vigilant about any perceived federal interference and have argued that the Corps is usurping their authority by asserting jurisdiction over all the water within its reservoirs.<sup>11</sup>

When the Corps proposed a rule in 2016 seeking to clarify the relevant law and establish general national policy on making water available from existing projects,<sup>12</sup> it drew serious opposition and relatively little support. A range of commenters sharply criticized the proposed "Water Supply Rule" on legal, policy and process grounds, and many asked the agency to pull it back. The Corps ultimately withdrew the rule, but still must decide how it will handle these issues, which will only get more difficult as climate change and competition for water intensify.

This article addresses some of the legal and policy issues surrounding water supply at existing Corps projects. Part II summarizes the Corps' water supply authorities, focusing on established laws and practices for existing projects. Part III considers the proposed Water Supply Rule, summarizing the Corps' views, key points raised by commenters, and questions remaining after the proposed rule was withdrawn. Part IV analyzes a key argument made by western states: that the Corps has no authority over the use of water that has reached a reservoir, but which the states regard as "natural flow" of the dammed river. Part V offers a limited set of policy suggestions for the Corps' water supply mission, intended to address key criticisms of the Water Supply Rule and improve long-term water

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10. *See In re: MDL-1824 Tri-State Water Rights Litigation*, 644 F.3d 1160, 1205 (11th Cir. 2011) (noting multiple cases over allocation of Lake Lanier water dating back to 1990).

11. *See* letter from James D. Ogbury, Executive Director, Western Governors Ass'n; Karen White, Executive Director, Conf. of Western Attorneys General; and Tony Willardson, Executive Director, Western States Water Council, to John Barrasso, Chairman, Senate Env't and Pub. Works Committee and Thomas Carper, Ranking Member, Senate Env't. and Pub. Works Committee (Feb. 27, 2020) (*available at* [https://westgov.org/images/editor/SEPW\\_WRDA\\_2020\\_FINAL.pdf](https://westgov.org/images/editor/SEPW_WRDA_2020_FINAL.pdf)) (requesting insertion of language in the 2020 Water Resources Development Act that would "thwart any future attempts by the Corps to unlawfully assert jurisdiction over such waters").

12. *Use of U.S. Army Corps of Engineers Reservoir Projects for Domestic, Municipal & Industrial Water Supply*, 81 Fed. Reg. 91556 (proposed Dec. 16, 2016) (to be codified at 33 C.F.R. Part 209) (hereinafter *Water Supply Rule Proposal*).

management. Part VI concludes.

## II. THE CORPS' EXISTING AUTHORITIES AND PRACTICES ON WATER SUPPLY

Although water supply has never been a primary mission, the Corps is already heavily involved in that line of work. As of 2016 the Corps had M&I water supply agreements in place at 136 reservoirs, providing a total of 9.8 million acre-feet of storage space.<sup>13</sup> These reservoirs are found in 25 states from coast to coast, but they are heavily concentrated in the Corps' Southwestern Division, especially Arkansas, Kansas, Oklahoma, and Texas.<sup>14</sup> (See map of Corps Divisions, Figure 1 [*see last page*].) While 9.8 million acre-feet is roughly only a third of the volume that the Bureau of Reclamation – for which water supply has always been the primary mission – delivers annually for M&I use,<sup>15</sup> it still represents a large amount of water. It is a testament to the size of its works that the Corps makes room to store more than 3 trillion gallons of water for a use that has never been more than a side business.

Over 90 percent of this storage volume was essentially designed and built into Corps projects at the request of prospective users.<sup>16</sup> Thus, the vast majority of storage space devoted to M&I water supply in Corps reservoirs was originally allocated to that purpose. An entity requesting such storage must agree to pay the cost of it, with repayment periods extending over decades.<sup>17</sup> The total amount paid for M&I water supply from Corps projects is relatively modest, ranging between \$42 million and \$66 million for most years from 2007 to 2014.<sup>18</sup>

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13. STATUS AND CHALLENGES, *supra* note 4, at viii.

14. *Id.* at 17 (Figure 2-3). The Corps has 7 divisions in the Lower 48 states, one of which is the Southwestern Division covering most of Texas, all of Oklahoma, much of southern Kansas, and parts of Arkansas and Missouri. *Id.* at 4 (Figure 1-2). M&I water supply is by far most important in the Southwestern Division, with over 60% of water supply agreements found there, representing over 70% of the total storage space for this purpose. *Id.* at 18 (Table 2-2). 62 of the 136 projects with an agreement for M&I water supply are located in the Southwestern Division. *Id.*

15. *About Us – Fact Sheet*, U.S. BUREAU OF RECLAMATION, <https://www.usbr.gov/main/about/fact.html> (last visited July 8, 2021). The Bureau claims to deliver 10 trillion gallons of water per year to M&I use, or about 30 million acre-feet. (An acre-foot is 325,851 gallons.)

16. Such storage was “included at the request of non-federal users at the time the projects were being planned, designed and constructed.” STATUS AND CHALLENGES, *supra* note 4, at viii.

17. 43 U.S.C. § 390b(b). Repayment periods of up to 50 years were allowed under the original terms of the 1958 Water Supply Act, but Congress later shortened the maximum term to 30 years. *See* Water Supply Rule Proposal, *supra* note 12, at 91574 n.26.

18. STATUS AND CHALLENGES, *supra* note 4, at 20 (Table 2-5). Higher figures for two of

As demands for M&I water grow in some parts of the country, the Corps may increasingly be asked to satisfy those demands from its existing reservoirs. It reports:

As the construction of major federal reservoir projects came to an end in the 1980s, the focus of the Corps water supply program shifted to reallocation of storage space in existing projects from another purpose, or purposes, to specifically serve water supply needs. Decisions to reallocate reservoir storage space to water supply have become increasingly difficult over time, as they are intertwined with all of the other challenges facing our aging dam and reservoir projects and increasingly competing demands for limited supplies of water.<sup>19</sup>

The next Part summarizes current Corps authorities for reallocating reservoir storage.

*A. The Corps' statutory authorities for allocating water from existing reservoirs*

The Corps may make water (or storage space) in its existing reservoirs available for M&I use under two different statutes, each enacted in the middle years of the 20<sup>th</sup> Century.

1. Surplus water”: Section 6 of the 1944 Flood Control Act

The landmark Flood Control Act of 1944<sup>20</sup> is known primarily for authorizing the Pick-Sloan Plan for the Missouri River Basin,<sup>21</sup> resulting in the Corps' string of dams and giant reservoirs on the mainstem Missouri – the largest reservoir system in the nation.<sup>22</sup> But the Flood Control Act also established a general legal framework for Corps of Engineers projects on issues such as the development of recreation facilities at Corps reservoirs<sup>23</sup> and the sale of surplus

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those years resulted from unusual one-time payments regarding specific projects. *Id.* at 20–21.

19. *Id.* at viii.

20. Act of Dec. 22, 1944, ch. 665, 58 Stat. 887.

21. See *ETSI v. Missouri*, 484 U.S. 495, 500–02 (1988) (describing development of the Pick-Sloan Plan). The Pick-Sloan Plan resulted from the “shameless shotgun wedding” of the Corps' Pick Plan (emphasizing flood control and navigation) and the Bureau of Reclamation's Sloan Plan (emphasizing irrigation). See JOHN E. THORSON, *RIVER OF PROMISE, RIVER OF PERIL: THE POLITICS OF MANAGING THE MISSOURI RIVER* 63–67 (1994).

22. “[A] series of six massive reservoirs have been constructed on the river's main channel, creating three of the five largest man-made lakes in the United States. With a combined storage capacity of seventy-four million acre-feet, it is the largest reservoir system in the United States.” John H. Davidson, *Marketing Missouri River Water: Competing Plans for Commoditizing a Natural Resource*, 89 N.D. L. REV. 1, 3 (2013).

23. 16 U.S.C. § 460d, originally enacted as § 4 of the 1944 Flood Control Act.

hydropower from Corps projects.<sup>24</sup> Section 6 bears the heading “Sale of surplus waters for domestic and industrial uses; disposition of moneys,” and reads in its entirety,

The Secretary of the Army is authorized to make contracts with States, municipalities, private concerns, or individuals, at such prices and on such terms as he may deem reasonable, for domestic and industrial uses for surplus water that may be available at any reservoir under the control of the Department of the Army: *Provided*, That no contracts for such water shall adversely affect then existing lawful uses of such water. All moneys received from such contracts shall be deposited in the Treasury of the United States as miscellaneous receipts.<sup>25</sup>

This language is substantively unchanged from the original 1944 text. Section 6 was mistakenly repealed, but Congress restored it in 1952.<sup>26</sup>

The statute does not define the key term “surplus water,” or explain what is meant by “then existing lawful uses of such water.” In *ETSI Pipeline Project v. Missouri*,<sup>27</sup> a case that turned on the meaning of a different section of the Flood Control Act, the Supreme Court wrote that the language of Section 6 “is plain enough: ‘surplus water’ is all water that can be made available from the reservoir without adversely affecting other lawful uses of the water.”<sup>28</sup> The Court also endorsed the Corps’ interpretation of Section 6, giving the Corps discretion to authorize withdrawals of reservoir water for M&I use “if to do so would not impair the efficiency of the project for its other stated purposes.”<sup>29</sup>

Other than making states eligible for surplus water contracts from Corps reservoirs, Section 6 makes no mention of states’ role in water allocation or management. Congress addressed these points in Section 1 of the Flood Control Act, however, declaring its policy “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 . . . .”<sup>30</sup> Section 1 also requires the

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24. *Id.* § 825s, originally enacted as § 5 of the 1944 Flood Control Act.

25. 33 U.S.C. § 708.

26. Act of May 23, 1952, ch. 328, § 1(a), 66 Stat. 93. According to the Corps, the legislative history of the 1952 bill explains that § 6 was “inadvertently repealed along with obsolete government property laws,” but restored once it was recognized that “surplus water” at Corps reservoirs was not garden-variety surplus government property. Water Supply Rule Proposal, *supra* note 12, at 91564 n.11, citing S. Rep. No. 82-1348 at 1–2 (Mar. 24, 1952).

27. 484 U.S. 495 (1988).

28. *Id.* at 506. The case turned primarily on § 8 of the Flood Control Act, 43 U.S.C. § 390.

29. The Court stated, “This view is consistent with the language of the Act . . . .” 484 U.S. at 506 n.3.

30. 33 U.S.C. § 701-1.

Corps to share information with affected states about investigations of potential new projects; to give states “opportunity for consultation regarding plans and proposals” for projects; and to provide “each affected State” with a copy of the Corps’ report on a proposed project, allowing a limited time (currently 30 days) for comment.<sup>31</sup>

## 2. “Storage” in Corps reservoirs for M&I water: The Water Supply Act

The more significant and detailed statute regarding M&I water use from Corps reservoirs is the Water Supply Act (WSA) of 1958.<sup>32</sup> The WSA provides general authority for allocating storage space for this purpose in new and existing Corps reservoirs, subject to a key prerequisite and a somewhat vague restriction. Congress also included a statement of policy on state authority for water supplies.

Most fundamentally, the WSA provides in subsection (b) that “storage may be included in any reservoir project surveyed, planned, constructed or to be planned, surveyed and/or constructed by the Corps of Engineers or the Bureau of Reclamation to impound water for present or anticipated future demand or need for municipal or industrial water . . . .”<sup>33</sup> Obtaining reservoir space for M&I water, however, requires an advance commitment by a state or local entity to pay its fair share of project costs. “[B]efore construction or modification of any project including water supply provisions for present demand is initiated, State or local interests shall agree to pay for the cost of such provisions in accordance with the provisions of this section.”<sup>34</sup>

The WSA imposes this restriction on providing storage space for M&I water supply:

Modifications of a reservoir project heretofore authorized, surveyed, planned, or constructed to include storage as provided in subsection (b) of this section which would seriously affect the purposes for which the project was authorized, surveyed, planned, or constructed, or which would involve major structural or operational changes shall be made only upon the approval of Congress as now provided by

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31. *Id.* § 701-1(a).

32. Pub. L. No. 85-500, § 301, 72 Stat. 297, 72 Stat. 319 (1958) (codified as amended at 43 U.S.C. § 390b).

33. 43 U.S.C. § 390b(b).

34. “*Provided*, That the cost of any construction or modification authorized under the provisions of this 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, as determined by the Secretary of the Army or the Secretary of the Interior, as the case may be.” *Id.* (emphasis provided).



law.<sup>35</sup>

Thus, Congress must approve any reallocation of reservoir storage that would “seriously affect” the authorized purposes of the project or “involve major structural or operational changes.” The statute offers no guidance on how big an effect or change need be to trigger this requirement.<sup>36</sup>

Like other statutes involving federal water projects,<sup>37</sup> the WSA includes a provision acknowledging state authority over water allocation and development. Congress declared its policy 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 water projects.<sup>38</sup>

*B. The Corps’ practices regarding M&I water supply at existing projects*

The Corps has made little use of its Section 6 “surplus water” authority,<sup>39</sup> choosing to rely on the WSA in making M&I water available from its reservoirs. On the whole, WSA agreements allocate over 9 million acre-feet of storage space,<sup>40</sup> but the vast majority of this space was designated for M&I water supply as part of a new Corps project. As for *reallocating* space in existing reservoirs, as of 2012 the Corps had made 138 agreements involving 45 of its projects, totaling over 850,000 acre-feet of storage.<sup>41</sup> Nearly three-fourths of these

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35. *Id.* § 390b(e).

36. The D.C. Circuit Court of Appeals interpreted this provision in *Southeastern Federal Power Customers v. Geren*, 514 F.3d 1316 (D.C. Cir. 2008), holding that the Corps’ allocation of over 20 percent of Lake Lanier’s storage space for M&I water supply would involve a “major” operational change. For more on the Lake Lanier litigation, *see infra* notes 62–70 and accompanying text.

37. *See* 43 U.S.C. § 383, also known as Section 8 of the Reclamation Act (regarding Bureau of Reclamation projects); 16 U.S.C. § 821, also known as Section 27 of the Federal Power Act (regarding hydropower projects licensed by the Federal Energy Regulatory Commission).

38. 43 U.S.C. § 390b(a).

39. “The Corps has only rarely entered into surplus water contracts pursuant to Section 6. As of July 2016, nine contracts relying on Section 6 were currently in effect, two of which involved no cost at all, and only one of which involves a cost greater than \$1039 . . .” Water Supply Rule Proposal, *supra* note 12, at 91583.

40. *Id.* at 91557. *See also* STATUS AND CHALLENGES, *supra* note 4, at 18 (Table 2-5) (providing more information on the number, type, and cost of these agreements for each of 7 Corps divisions).

41. *Id.* at 19 (Table 2-3). Most of these agreements, and of the reallocated space, are in the

agreements, involving nearly two-thirds of the total storage space, were made after the 1980s.<sup>42</sup>

The Corps has acknowledged that its many offices across the country have not always gone “by the book” in allowing use of water from its reservoirs for M&I and other uses.

In many cases—approximately 1,600, according to a 2012 audit—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 citing a specific authority, without formal determinations that surplus water is available, and without clear documentation of impacts to other authorized purposes or costs incurred by the Government in authorizing the withdrawals.<sup>43</sup>

The Corps is not too concerned about the practical impacts of these uses-by-easement, however, believing the great majority to be “relatively small-scale withdrawals, associated with State-administered water rights, for limited time periods, which have no known effect on project operations.”<sup>44</sup>

The Corps has been working for over a decade to identify and prioritize projects where there may be strong interest and potential for water reallocation.<sup>45</sup> This effort produced a list of 52 priority projects for reallocation studies, and as of 2016 it had at least begun reallocation studies at about three dozen projects.<sup>46</sup> These priority projects include the six mainstem Missouri River reservoirs, as well as multiple reservoirs in Arkansas, Georgia, Kentucky, Missouri, Oklahoma, and Oregon.<sup>47</sup> The Corps indicates that budget constraints and competing priorities limit the available funding for reallocation studies.<sup>48</sup> Even if a study is completed, the Corps may not reallocate storage space or

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Corps’ Southwestern Division.

42. *Id.* at 20 (Table 2-4). Two large reallocations in 2010 involving Lake Texoma resulted from an earlier statute providing for reallocation of space from hydropower to M&I water supply. *Id.* at 20.

43. Water Supply Rule Proposal, *supra* note 12, at 91557.

44. *Id.* at 91583. About 400 of these 1600 easements involve the 6 mainstem Missouri River reservoirs. *Id.*

45. STATUS AND CHALLENGES, *supra* note 4, at 13–14.

46. *Id.* at 14–16. Figure 2-2, p. 15 is a map of the 52 priority projects. “[S]ince the list of 52 priority projects was prepared, study efforts have been undertaken at 26 of those projects. Additional study work has been performed at 10 other projects in response to the evolving priorities identified through the budget process.” *Id.* at 16.

47. *Id.* at 15 (Figure 2-2). A table identifies the 52 projects (further classified as high, medium, or low priority, or merely “potential”), and identifies those projects for which a reallocation study commenced after 2008. *Id.*, app. C.

48. *Id.* at 16. The Corps also indicates, however, that some studies have been “funded outside the normal budget process, either with contributed funds or reprogrammed operations and maintenance funding.” *Id.*

complete a water supply agreement.<sup>49</sup>

The Corps' decision whether to reallocate storage in a reservoir is largely a technical determination, considering any necessary operational changes and the storage volume necessary to support the requested water use. "This evaluation takes into account projected hydrologic conditions over a lengthy period of analysis, including projected inflows and outflows from all sources, as well as other constraints such as flow requirements for water quality or other authorized purposes during that period."<sup>50</sup> The allocation of storage space in a reservoir provides no guarantee that water will actually be available, but "the amount of storage included for water supply reflects the Corps' technical, engineering judgment that the reservoir project . . . can satisfy the projected water supply withdrawals during reasonably foreseeable circumstances."<sup>51</sup>

The Corps has established national-level guidance stating its interpretations and policies regarding its water supply authorities.<sup>52</sup> This guidance describes the appropriate circumstances for using Section 6 rather than the WSA, lays out procedures and criteria for water reallocation, touches on the role of states, provides for public input, and addresses pricing and other aspects of water supply agreements. Adopted in 2000, this guidance provides a more-or-less detailed policy framework for the Corps' decisions and activities regarding water supply at new and existing projects.

### *C. Controversies over M&I water allocations from Corps reservoirs*

The Corps' water supply activities have produced some notable controversies in the 21<sup>st</sup> Century, especially in the Missouri and Apalachicola-Chattahoochee-Flint (ACF) river systems. Each of these basins has seen its share of water conflicts since the 1980s, and while these conflicts have largely been classic upstream-downstream disputes, allocation of water from Corps reservoirs has been a major

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49. "Funding a study to completion does not necessarily indicate that the study was approved or that final water supply agreements were executed. There are many reasons why a study may pause or terminate without final approval or signature of agreements." *Id.*

50. Water Supply Rule Proposal, *supra* note 12, at 91575 (describing the Corps' process in evaluating a water supply request).

51. *Id.* at 91576.

52. Dep't of the Army, U.S. Army Corps of Engineers, Engineer Regulation No. 1105-2-100, Planning Guidance Notebook (Apr. 22, 2000). This guidance is part of an extensive set of internal Engineer Regulations available at <https://www.publications.usace.army.mil/USACE-Publications/Engineer-Regulations/> (last visited July 13, 2021).

bone of contention.

### 1. The Missouri River surplus water dispute

The Missouri River system is vast, diverse, and complex,<sup>53</sup> but perhaps the greatest divide in the basin is between the upper basin states of Montana, North Dakota, and South Dakota, and the lower riparian states of Iowa, Kansas, Missouri, and Nebraska. In general and oversimplified terms, the lower four states want the Corps to use its six large upstream reservoirs to control floods and release enough water for downstream navigation on the Missouri; the upstream states, where those reservoirs are located,<sup>54</sup> have an interest in keeping lake levels high enough to support economically important recreational uses. This upstream-downstream tension boiled over in the drought years of the early 2000s, when the Corps was forced to defend a cascading series of lawsuits over its reservoir operations.<sup>55</sup>

The upper basin states – and especially the Dakotas, where the Missouri is largely a series of Corps reservoirs – are also intent on ensuring access to river water for consumptive uses within their borders. This emphasis led to the “O’Mahoney-Millikin Amendment” to the 1944 Flood Control Act, which basically subordinates downstream navigation use of Corps reservoir water to “any beneficial consumptive use, present or future, in States lying wholly or partly West of the ninety-eighth meridian, of such waters for domestic, municipal, stock water, irrigation, mining, or industrial purposes.”<sup>56</sup> South Dakota and the Bureau of Reclamation (not the Corps) approved use of reservoir water for an industrial project in the 1980s, but that allocation was opposed by lower basin states and blocked by the courts.<sup>57</sup>

The most recent dispute arose around 2010, over water demands for energy development in western North Dakota.<sup>58</sup> Hydraulic

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53. See Davidson, *supra* note 22, at 3–4.

54. The lowest of the six mainstem dams, Gavins Point, is shared by Nebraska and South Dakota, and its reservoir, Lewis & Clark Lake, basically forms the border between the two states for several miles.

55. See *South Dakota v. Ubbelohde*, 330 F.3d 1014 (8th Cir. 2003); *In re Operation of the Missouri River System Litigation*, 421 F.3d 618 (8th Cir. 2005).

56. Act of Dec. 22, 1944, ch. 665, § 1(b), 58 Stat. 887, 888, codified at 33 U.S.C. § 701-1(b). This language suggests that harm to navigation below Gavins Point Dam may never block a consumptive use of Missouri Basin water in Montana or the Dakotas, but its meaning is disputed. Thorson, *supra* note 21, at 69, 91.

57. The litigation culminated in the Supreme Court’s decision in *ETSI Pipeline Project v. Missouri*, 484 US 495 (1988), explained further below in Part IV.C.

58. CONG. RESEARCH SERVICE, *THE BAKKEN FORMATION: LEADING UNCONVENTIONAL*

fracturing (fracking) of oil wells in the Bakken Formation required a substantial volume of water, estimated to reach 22 million gallons per day (over 24,000 acre-feet annually).<sup>59</sup> The Corps agreed to make “surplus” water available for this purpose on renewable five-year contracts, but it originally proposed charging a fee for this water based on a portion of the costs of building and operating the relevant reservoir.<sup>60</sup> The Corps later agreed to make water available free of charge while it developed a pricing policy,<sup>61</sup> but by then it had already “stirred considerable controversy because it reignited a decades-old disagreement between the Corps and North Dakota interests regarding access to Missouri River water.”<sup>62</sup> As North Dakota’s chief water official wrote to the Corps, “I consider the entire surplus water initiative to be an illegal taking of state water rights by an agency of the federal government . . . .”<sup>63</sup> The Western States Water Council, “representing the governors of 18 western states on water policy issues,” argued that the Corps’ position regarding water supply contracts on the Missouri “would improperly expand the Corps’ authority and violate the states’ rights . . . .”<sup>64</sup> Congress stepped in on this point in 2014, forbidding the Corps from charging for water from its Missouri River reservoirs for ten years,<sup>65</sup> but the underlying dispute between the Corps and North Dakota (among others) is unresolved.

## 2. The ACF dispute over Lake Lanier

The ACF basin has its own upstream-downstream dynamic that has generated plenty of controversy and litigation. In the most recent and famous case, the Supreme Court rejected Florida’s attempt to protect downstream ecosystems and the important Apalachicola Bay oyster fishery from upstream consumptive uses in Georgia.<sup>66</sup> Even though the Supreme Court case focused on Georgia’s use of Flint River water for irrigation, the Corps was a major factor in that litigation

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OIL DEVELOPMENT 10–12, CRS Report R42032 (2012). CRS Reports typically list individual authors, but the four authors of this report had their names redacted.

59. *Id.* at 11–12,

60. *Id.* at 13.

61. *Id.*

62. *Id.*

63. Letter from Todd Sando, State Engineer, North Dakota, to Col. Robert Ruch, U.S. Army Corps of Engineers (Feb. 1, 2011) (on file with author).

64. Letter from Phillip C. Ward, Chairman, Western States Water Council, to Jo-Ellen Darcy, Assistant Secretary of the Army (Civil Works) (Aug. 6, 2013) (on file with author).

65. Pub. L. 113-121, § 1046(c), 128 Stat. 1193, 1254 (June 10, 2014).

66. *Florida v. Georgia*, 141 S.Ct. 1175, 1183 (2021).

because its reservoirs on the Chattahoochee largely control downstream flows in the Apalachicola.<sup>67</sup>

Long before the Supreme Court case, however, the states of Alabama, Florida, and Georgia were fighting each other and the Corps over allocation of water from Lake Lanier. The Corps had been allowing M&I water use from Lake Lanier since the 1970s under a series of 5-year agreements, but when the Corps issued a report to Congress proposing allocation of over 200,000 acre-feet of storage to supply water for the Atlanta area, Alabama sued to challenge the Corps' action.<sup>68</sup> Attempts to reach an interstate compromise failed, and years later the Corps sought to allocate up to 240,000 acre-feet of Lake Lanier storage for M&I water use in greater Atlanta.<sup>69</sup> Alabama and Florida challenged that action, and the D.C. Circuit Court of Appeals ruled that the Corps had violated the Water Supply Act by committing so much of the reservoir to water supply. The WSA requires Congressional approval for a "major" operational change, and the Court held that reallocating up to 22% of Lake Lanier storage – even temporarily – was clearly a major change.<sup>70</sup>

The Corps took the position that reallocation of Lake Lanier storage was necessary because M&I water use was not an authorized purpose of the project.<sup>71</sup> Following the D.C. Circuit's decision, however, Georgia argued in related litigation that Congress had intended the reservoir to be used for water supply when it originally authorized the project.<sup>72</sup> That argument failed at the district court level,<sup>73</sup> but the 11<sup>th</sup> Circuit Court of Appeals bought it, placing remarkable weight on some aspects of the legislative history of the

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67. *See* *Florida v. Georgia*, 138 S.Ct. 2502 (2018), at 2519–26 (addressing Flint River water use and the role of Corps reservoir operations in determining flows into Florida).

68. *See* *Southeastern Federal Power Customers v. Geren*, 514 F.3d 1316, 1318–19 (D.C. Cir. 2008).

69. This volume was a substantial percentage of Lake Lanier's storage space, which was about 1.05 million acre-feet. The allocation was to be made for ten years, renewable for one additional ten-year period. *See id.* at 1319–20.

70. *Id.* at 1324. The change was arguably less major because the Corps had already been making over 145,000 acre-feet of storage space in Lake Lanier temporarily available for M&I water use in Georgia, but the court was unpersuaded. "Even a nine percent (9%, approximately 95,000 acre feet) increase over 2002 levels for twenty years is significant." *Id.*

71. *Id.* at 1324–25.

72. *In re Tri-State Water Rights Litigation*, 639 F. Supp.2d 1308 (M.D. Fla. 2009).

73. *See id.* at 1344–47 (calling the conclusion "inescapable" that water supply was not an authorized purpose of the project). The court laid out the complicated history of the planning and authorization for the Buford Dam/Lake Lanier project, showing clear Congressional intent for flood control, navigation, and hydropower purposes but much less clarity regarding water supply. *Id.* at 1310–21.

authorization.<sup>74</sup> This holding cleared a legal path for the Corps to allocate a large volume of Lake Lanier storage for M&I water use in Georgia, and the 11<sup>th</sup> Circuit remanded the matter to the Corps for a final decision not only as to Lake Lanier, but also broader questions such as the meaning of the WSA term “major operational change.”<sup>75</sup> Not surprisingly, the Corps followed up with a legal determination that it had the authority to approve Georgia’s water supply request.<sup>76</sup>

The Missouri and ACF disputes appear somewhat atypical of the Corps’ water supply activities as a whole. Both fall outside the Southwestern Division, where the Corps plays the biggest role in M&I water supply and has engaged most significantly in reallocation,<sup>77</sup> apparently without much high-level controversy. And while they are not the only recent conflicts over water reallocation from Corps reservoirs,<sup>78</sup> the Missouri and ACF disputes are especially important to the Corps’ national efforts on M&I water supply for at least two reasons. First, they are background stories that provide important context for the Corps’ water supply decisions and, rightly or wrongly, many players – including the Corps itself<sup>79</sup> – will tend to see the issues through the lens of these disputes. Second, the Lake Lanier controversy prompted the Corps to tackle some legal and policy issues regarding M&I water supply at existing reservoirs. Following a legal opinion from its Chief Counsel on its WSA authority,<sup>80</sup> the Corps embarked on rulemaking to establish national policy regarding surplus

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74. *In re MDL-1824 Tri-State Water Rights Litigation*, 644 F.3d 1160, 1186–92 (11th Cir. 2011).

75. *Id.* at 1201. The court required the Corps to make this decision within one year. *Id.* at 1205.

76. Memorandum from Earl H. Stockdale, Chief Counsel, Army Corps of Engineers, to Chief of Engineers, re Authority to Provide Water for Municipal and Industrial Water Supply from the Buford Dam/Lake Lanier Project, Georgia, June 25, 2012, *available at* [https://www.sam.usace.army.mil/Portals/46/docs/planning\\_environmental/acf/docs/2012ACF\\_leg\\_alopinion.pdf](https://www.sam.usace.army.mil/Portals/46/docs/planning_environmental/acf/docs/2012ACF_leg_alopinion.pdf) (hereinafter Stockdale Opinion).

77. *See supra* note 12 and accompanying text regarding water supply generally and note 41 and accompanying text regarding reallocation.

78. One recent controversy surrounds reallocation of storage space in the Corps’ reservoirs in western Oregon’s Willamette Basin. Unlike the Missouri and ACF disputes, the Willamette reallocation does not involve any interstate tension over water access and use; instead, ESA compliance and the water needs of listed salmon species are the primary issues. *See* Richard M. Glick & Olivier Jamin, 209 THE WATER REPORT 1, 3–5 (July 15, 2021).

79. The “background” section of the preamble to the Corps’ proposed Water Supply Rule devoted almost a full page to a summary of the Missouri and ACF controversies, without mentioning any others. Water Supply Rule Proposal, *supra* note 12, at 91558.

80. Stockdale Opinion, *supra* note 76.

water and storage agreements.<sup>81</sup> The Corps stated that its “proposed rule would address the specific issues that have arisen most notably in the [Missouri and ACF systems], but is also intended to provide greater clarity, consistency, and efficiency in implementing Section 6 and the WSA nationwide.”<sup>82</sup>

### III. THE CORPS’ WATER SUPPLY RULE PROPOSAL

The Corps ultimately published its proposed rule on “Use of U.S. Army Corps of Engineers Reservoir Projects for Domestic, Municipal and Industrial Water Supply” in December 2016,<sup>83</sup> in the final weeks of the Obama Administration. The proposed Water Supply Rule drew mostly critical comments, and the Corps ultimately withdrew it early in 2020.<sup>84</sup> This section examines the purposes and key provisions of the proposed Water Supply Rule, identifies key points from the comments, and addresses the fate of the proposed rule.

#### A. *The Corps’ stated purpose for the rulemaking*

In the proposed rule preamble, the Corps explained that it had never established a uniform legal and policy framework for implementation of its authorities under Section 6 and the WSA,<sup>85</sup> resulting in inconsistent and sometimes inadequate practices regarding water supply agreements. Seeing a need to update and standardize this framework, the Corps invited comment on its legal interpretations and proposed policies,<sup>86</sup> and laid out its good-government goals:

This notice-and-comment rulemaking is intended to bring greater clarity and consistency to the Corps’ implementation of Section 6 and the WSA, facilitate access to Corps reservoirs for water supply where water can be made available under Section 6 or the WSA, provide clear documentation of the potential impacts to other authorized purposes, promote more effective cooperation with State and local interests in the development of water supplies, and allow for the development of new policies to address complex issues that

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81. Water Supply Rule Proposal, *supra* note 12, at 91558.

82. *Id.* at 91558–59.

83. *Id.* at 91556.

84. Use of U.S. Army Corps of Engineers Reservoir Projects for Domestic, Municipal & Industrial Water Supply; Withdrawal, 85 Fed. Reg. 16307 (Mar. 23, 2020) (hereinafter Water Supply Rule Withdrawal).

85. The Corps noted that in the absence of published rules, its “existing water supply policies and practices are generally set forth in an internal publication, Engineer Regulation (ER) 1105-2-100, Planning Guidance Notebook (Apr. 22, 2000).” Water Supply Rule Proposal, *supra* note 12, at 91557. See *supra* note 50 and accompanying text.

86. Water Supply Rule Proposal, *supra* note 12, at 91557.



have arisen since the statutes were enacted.<sup>87</sup>

The Corps then delivered a flurry of disclaimers, stating what the proposed rule would not do or was not intended to do.<sup>88</sup> Perhaps most importantly, the Corps declared that it did not intend the Water Supply Rule “to upset the balance between federal purposes and state prerogatives, or to assert greater federal control over water resources . . . .”<sup>89</sup> Nor was the proposed rule intended to interfere with other federal agency activities, including federal hydropower marketing undertaken by federal Power Marketing Administrations (PMAs).<sup>90</sup> The rule would apply only to Corps reservoirs, and even there it would not directly cause any changes to project facilities or operations; the Corps insisted that it would engage in extensive analysis and a public process before changing project operating manuals or reallocating reservoir space for water supply.<sup>91</sup>

The Corps also downplayed the economic impacts of the rule, as well as its effects on various sectors and interests, in making findings required by various executive orders. It declared that the proposed rule was not expected to have \$100 million or more in economic impact, or have major effects on water users or federal revenues.<sup>92</sup> Regarding Indian tribes, the Corps saw no reason for them to be concerned, in

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87. *Id.* at 91558.

88. The rule would not change existing water supply agreements under Section 6 or the WSA, though the Corps noted that the new rule would apply to any new or renewed agreements after its effective date. *Id.* at 91559.

89. *Id.*

90. *Id.* There are four PMAs within the U.S. Department of Energy, each serving a different region of the country. “PMAs market power from federal projects at the lowest possible rates to preference customers, consistent with sound business principles, so as to encourage the most widespread use of federal assets. If excess power is available beyond the needs of preference customers, the PMAs may sell surpluses to non-preference entities.” Differences in the way that the PMAs operate are due to several things, including their statutory authorities, their role in electricity transmission, and the number and size of their dams. U.S. DEP’T OF ENERGY, EFFECTS OF CLIMATE CHANGE ON FEDERAL HYDROPOWER 7 (Aug. 2013).

91. The Corps summarized the relevant process and legal requirements as follows:

Before promulgating or revising water control manuals, or including storage for water supply, or finalizing a surplus water determination, the Corps solicits public comment, prepares all required documentation, and complies with applicable law, including but not limited to the CWA, the Endangered Species Act (ESA), and the National Environmental Policy Act (NEPA). When proposing to reallocate storage for water supply under the WSA and prior to issuance of a final surplus water determination, the Corps prepares, and considers public comments on, reports evaluating such proposals, including evaluation of environmental impacts, effects on operations for authorized purposes, and continued compliance with applicable law.

Water Supply Rule Proposal, *supra* note 12, at 91559.

92. *Id.* at 91582. The Corps stated that the proposed rule was “significant” for purposes of Executive Order 12866 (and the required review by the Office of Management and Budget) only because it raises novel legal or policy issues. *Id.* (citing executive orders).

part because the proposed rule “would clarify that the Corps’ exercise of its authority under Section 6 or the WSA shall not adversely affect any Tribal or other federal reserved water right, including reserved water rights that have not been quantified.”<sup>93</sup> The Corps similarly saw no implications for states or federalism, seeing the rule as respecting state authorities regarding water development in the way Congress intended. According to the Corps, the proposed rule “would not change the relationship between the federal government and the States. Rather, the rule would reinforce the Corps’ current practice of recognizing the interests and rights of States in the development of waters, as provided in existing law.”<sup>94</sup>

The Corps seemed eager to defuse the concerns that were likely to arise from a federal agency establishing a national rule regarding its water supply authorities. The Corps stated that it was seeking “positive dialogue” with stakeholders and the public on water supply policy,<sup>95</sup> and that it “invites and welcomes” public input and “looks forward to this exchange of views. . . .”<sup>96</sup>

### *B. Key elements of the proposed Water Supply Rule*

Before addressing the key statutory terms and policy considerations of Section 6 and the WSA, the Corps explained its view of the different purposes of these two authorities. Under Section 6, water supply does not become an authorized project purpose, but the Corps may allow a user to withdraw water from a reservoir for a time, if doing so would not conflict with other lawful water uses during that period. The WSA, by contrast, makes water supply a project purpose, and makes storage available in a reservoir to serve long-term water demands.<sup>97</sup> The latter should be used for “long-term and permanent water supply needs that require the dependability afforded by storage,” whereas Section 6 is appropriate “to address water supply needs provisionally, for as long as surplus water is determined to be

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93. *Id.* at 91587. The Corps also noted that it followed a public process in developing manuals for project operations, and tribes could participate in this process by providing information and input on tribal interests and uses. *Id.*

94. *Id.* The Corps further noted that the proposed rule would not affect any existing state-law water rights, but rather would “improve the ability of the Corps to exercise its authority under Section 6 and the WSA to facilitate the exercise of water rights held by others,” and to assist states in their water-development goals. *Id.*

95. *Id.* at 91559, 91562.

96. *Id.* at 91562.

97. *Id.* at 91559–60.

available.”<sup>98</sup>

### 1. Allowing use of surplus water under Section 6

Fundamentally, Section 6 authorizes the Corps to “make contracts . . . for surplus water that may be available” at any Corps reservoir, but no such contract may “adversely affect then existing lawful uses of such water.”<sup>99</sup> Thus, the crucial Section 6 terms to be defined in the rulemaking were “surplus water” and “then existing lawful uses.”

The Corps declared that the key factor in determining “surplus water” is whether the amount of water to be withdrawn is needed to fulfill an authorized purpose of the reservoir. If a quantity of water is available at a reservoir and can be withdrawn without impairing operations for an authorized purpose, it can be considered “surplus” for purposes of Section 6.<sup>100</sup> Such a quantity may be deemed unnecessary to the project for any of three reasons, one of which is that the amount to be withdrawn is small enough to have little to no effect on authorized purposes.<sup>101</sup> Water would not be considered surplus, however, if it were “needed for an authorized purpose, such as hydropower generation, or releases to comply with downstream flow requirements” set pursuant to federal laws such as the Clean Water Act (CWA) or Endangered Species Act (ESA).<sup>102</sup>

As for “then existing lawful uses,” which take priority over surplus water contracts under Section 6, the Corps proposed to define them as uses authorized under state water law, “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.”<sup>103</sup> The Corps explained that the “Tribal or other uses” language was intended to recognize Tribal or federal reserved water

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98. *Id.* at 91581. The Corps cast this distinction as statutory interpretation, reflecting “the different terminology, structure, and intent behind Section 6 and the WSA.” *Id.*

99. *Id.* at 91563 (quoting 33 U.S.C. § 708).

100. *Id.* at 91565.

101. *Id.* One reason water may be found not to be needed is that “the amount of water to be withdrawn, along with other such withdrawals during the specified time period, would have virtually no effect on operations for authorized purposes.” *Id.* The other two reasons are that an authorized purpose for which the project was originally intended has never fully developed, or that an authorized purpose now requires less water than it previously did. *Id.*

102. *Id.* at 91566.

103. *Id.* at 91570.

rights (including unquantified ones),<sup>104</sup> as well as “withdrawals pursuant to interstate compacts or other provisions of federal law (including the CWA and ESA).”<sup>105</sup> Before making a final decision regarding harm to existing lawful uses, the Corps would provide “early coordination” with states, tribes, and federal agencies, as well as notice and opportunity for public comment.<sup>106</sup>

Section 6 allows the Corps to set such prices and contract terms as it “deem[s] reasonable,” giving the agency enormous discretion on these points. Regarding pricing of surplus water, the Corps observed that the pricing policy in its current guidance<sup>107</sup> might not be appropriate, as it “effectively conflates provision of surplus water under Section 6 with the inclusion of storage under the WSA,”<sup>108</sup> including a portion of the costs of building the project. For a mix of legal, policy and practical reasons, the Corps proposed a change that would typically make surplus water much cheaper, limiting prices to the government’s separable costs of making the water available during the contract term.<sup>109</sup> Because such direct costs would generally be minor for a new surplus water agreement, the cost of such agreements under the proposed rule should be “minimal.”<sup>110</sup>

The Corps addressed a few other legal and policy issues under Section 6,<sup>111</sup> including an expansive interpretation of the statutory term “domestic and industrial uses” that would allow the Corps to make water available for *any* purpose except for irrigation uses covered by

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104. *Id.* The Corps added a footnote addressing tribal reserved rights and water uses, in which it stated that the Corps would “coordinate surplus water determinations with the Department of Interior and Tribal water resource agencies in order to identify any potential issues regarding lawful uses involving Tribes.” *Id.* at 91570 n.22.

105. *Id.* at 91570. Thus, the Corps mentioned CWA and ESA requirements as “existing lawful uses,” as well as factors to be considered in whether water could be deemed “surplus.” Although not at all clear, it appears that the Corps regards *withdrawals from the reservoir* under the ESA or CWA as “existing lawful uses,” whereas *downstream flow requirements* under one of these laws are factors to be considered in whether the water is deemed “surplus” at all. The Corps did not explain this distinction.

106. *Id.*

107. *See id.* at 91575.

108. *Id.* at 91570.

109. *Id.* at 91571–72. Such costs might include “expenses associated with administering and monitoring the contract, or by making temporary changes to reservoir operations to accommodate the surplus water withdrawals. Separable costs are those attributable solely to making the surplus water available.” *Id.* at 91572.

110. *Id.* at 91573.

111. These issues included interpreting “reservoir” to mean a facility operated by the Corps “that impounds water and is capable of being operated for multiple purposes and objectives.” *Id.* at 91568.

the federal Reclamation laws.<sup>112</sup> Perhaps the most contentious issue, however, was whether the definition of “surplus water” should exclude the portion of water in a reservoir that could be attributed to the “natural flows” of the underlying river – an issue addressed in greater detail in Part IV below.

## 2. Allocating storage space under the WSA

Since the Corps views the WSA as the appropriate means of making M&I water available for uses that require a reliable long-term water supply, and since the Corps has used the WSA for nearly all significant water supply agreements, this portion of the proposed rule was practically more important than the Section 6 portion. Because the statute provides that “storage may be included” in any Corps reservoir,<sup>113</sup> but not until a state or local entity commits to “share equitably” in paying project costs,<sup>114</sup> and that Congress must approve any storage allocation which would “seriously affect” authorized purposes or involve “major structural or operational changes,”<sup>115</sup> the Corps had to address several key terms in proposing a rule on its WSA authority.

Interpreting the term “storage may be included,” the Corps viewed it as conferring great discretion to make water supply an authorized purpose of a project, before or after construction, and with or without structural modifications.<sup>116</sup> At existing projects,

[w]hen water supply needs are accommodated under the WSA through operational changes, without structural modifications—that is, when the existing storage is used differently to accommodate new or additional water supply withdrawals—the Corps refers to this action as “reallocating” storage to water supply, either from storage that was previously designated for a particular purpose, or from a multipurpose, conservation storage pool that serves multiple purposes. The Corps uses the term “reallocation” to reflect the fact that storage will be used differently, and that costs associated with that storage, including operational costs, will be reallocated to water supply, and borne by the water supply user.<sup>117</sup>

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112. *Id.* at 91568–69. The Corps based this interpretation on inferences from the text and legislative history of the 1944 Flood Control Act. Given the generally accepted meanings of “domestic” and “industrial” in the context of water law, however, the Corps’ interpretation seems difficult to square with the plain language of Section 6 itself.

113. 43 U.S.C. § 390b(b).

114. *Id.*

115. *Id.* § 390b(e).

116. Water Supply Rule Proposal, *supra* note 12, at 91575.

117. *Id.* at 91576.

The Corps emphasized that it was not selling water, establishing water rights, or determining how a region's water supply needs were to be met, nor was it treating or distributing water. The agency insisted that its role was limited to making reservoir storage available to state or local entities, thus assisting them in developing their own water supplies.<sup>118</sup>

Regarding the cost of storage being reallocated for M&I water use at an existing project, the Corps proposed to continue its policy of allowing such costs to be calculated using alternative methodologies and selecting the highest value. Thus, the costs could be quantified based on the loss of revenue to the Federal Treasury due to the reallocation; the loss of overall project benefits (not limited to revenue losses); or the updated cost of storage, described as “a share of the original construction costs, in proportion to the percent of usable storage reallocated to water supply, updated to present day price levels.”<sup>119</sup> The Corps explained that because the updated cost of storage usually produces the highest value of these three, it is the most common basis for pricing reallocated storage.<sup>120</sup> The user must also pay its proportional share of annual Operations & Maintenance costs for the project.<sup>121</sup> In addressing the potential costs associated with a storage reallocation that could reduce hydropower generation at a project authorized for that purpose, the Corps said that it would “coordinate” with the relevant federal PMA, and would utilize the PMA's determination of the value of foregone hydropower in determining the impacts of the reallocation and the costs of storage.<sup>122</sup>

As for the thresholds for Congressional approval, the Corps proposed a case-by-case determination of whether a proposed reallocation of storage space would “seriously” affect authorized project purposes or involve a “major” operational change.<sup>123</sup> To make such a determination, the Corps would assess both the likely effects of the reallocation on project operations and benefits, and the intent of

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118. *See id.* (“It remains the sole responsibility of the water supply users to withdraw, treat, and deliver water from a Corps reservoir to end users, and to obtain whatever water rights may be required under State law.”).

119. *Id.* at 91577.

120. *Id.* at 91577 n.31.

121. *Id.* at 91576. Because “O&M” would roll too easily off the tongue, however, the official Corps abbreviation for these costs is OMRR&R, short for “operation, maintenance, repair, rehabilitation, and replacement.” *Id.*

122. *Id.* at 91577.

123. *Id.* at 91577–78.

Congress regarding the authorized project.<sup>124</sup> The Corps declared that its “definitive interpretation” of the WSA is that a storage reallocation would require Congressional approval if it would have an effect or require a change that would “fundamentally depart from what Congress intended when it authorized the project for construction.”<sup>125</sup> For about 35 years beginning in the mid-1970s, the Corps’ guidance was that reallocations would be considered “insignificant” if they involved the lesser of 50,000 acre-feet or 15 percent of project storage,<sup>126</sup> but the Corps discarded that guidance after its Chief Counsel issued legal opinions in 2009 and 2012.<sup>127</sup> The Corps declined to propose any fixed storage volume or percentage reallocation as presumptively insignificant (or major),<sup>128</sup> leaving itself maximum discretion to decide that it could reallocate storage in a reservoir without Congressional approval based on its view of Congress’ original intent regarding that project.<sup>129</sup>

The Corps addressed other details, including proposed definitions of “reservoir project” and “municipal and industrial water supply” that tracked similar terms in the Section 6 portion of the proposal.<sup>130</sup> One additional issue, addressed only in the WSA portion, was the extent to which the Corps would consider potential “return flows” from the use of stored water back into the reservoir and credit the amount of such return flows to a particular user.<sup>131</sup>

### 3. Water rights and the Corps’ role

Unlike the Bureau of Reclamation, with projects located only in

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124. *Id.* at 91579.

125. *Id.* at 91578. “The touchstone for this analysis depends in each case upon the specific legislation by which Congress authorized the project in question, and the expectations with regard to the project’s purposes, design, and operations, that are set forth in the reports and other documents that Congress incorporated or approved in the authorizing legislation.” *Id.*

126. *Id.* at 91577.

127. *See id.* at 91578 (citing Chief Counsel opinions, the more recent and thorough of which is the Stockdale Opinion, *supra* note 76).

128. The Corps’ chief rationale for proposing no volumetric or percentage threshold was that Congress had not established one in the WSA. *Id.* at 91578–79.

129. *See id.* at 91578 (While generally asserting broad discretion regarding operation of its projects, the Corps acknowledged that it “may not add or delete an authorized project purpose, nor materially alter the relative importance of authorized purposes, without the approval of Congress.”).

130. *Id.* at 91574–75.; *see supra* nn.104–05.

131. *See id.* at 91580–81 (The Corps acknowledged that it had lacked a standard policy on practice on this issue, and it proposed “new provisions that would clarify and improve the administration of water supply storage agreements, while continuing to provide for proportional crediting” of return flows or other “made inflows” from a specific user).

seventeen western states,<sup>132</sup> the Corps operates reservoirs nationwide. Thus, in contrast to its western cousin, the Corps' territory covers a very wide range of state-based legal systems for water allocation and water rights.<sup>133</sup> In proposing its Water Supply Rule, the Corps addressed water rights and insisted repeatedly that other entities were responsible for them. The Corps' consistent message on this subject was, in effect, "We don't do water rights."

The Corps was most emphatic in stating over and over that its water supply activities do not allocate or create water rights. "[W]hen the Corps acts pursuant to either Section 6 or the WSA, the Corps does not issue, sell, adjudicate, or allocate water rights for domestic, municipal, industrial, or other consumptive uses."<sup>134</sup> The Corps also declared that it "does not determine how water supply needs should be met within a region,"<sup>135</sup> and that its proposed Water Supply Rule would continue to respect "state prerogatives" regarding water allocation.<sup>136</sup>

The Corps also insisted that any would-be user seeking access to water from a Corps reservoir must obtain and maintain its own water rights.<sup>137</sup> Users are responsible for building their own infrastructure for making use of water, and securing the necessary water rights; the Corps simply makes its reservoir available as a source of that water.<sup>138</sup> Further, "[t]he Corps shall not obtain water rights on behalf of water supply users, nor shall it become, by virtue of any agreement [under Section 6 or the WSA], a party to any water rights dispute."<sup>139</sup>

Although the Water Supply Rule proposal focused almost entirely on M&I water supply authorities, it also briefly explained why the

132. See Reed D. Benson, *New Adventures of the Old Bureau: Modern-Day Reclamation Statutes and Congress' Unfinished Environmental Business*, 48 HARV. J. ON LEGIS. 137, 149 (2011).

133. The seventeen western states (from the Great Plains to the West Coast) in which the Bureau of Reclamation operates generally apply the Prior Appropriation Doctrine to surface water; the other states of the Lower 48 all followed- the Riparian Rights Doctrine at common law, and although many of these states now have statutory systems, the water law of these non-western states is generally based on Riparian Rights principles. See SANDRA B. ZELLMER & ADELL L. AMOS, *WATER LAW IN A NUTSHELL* 15, 18–21 (6th ed. 2021).

134. Water Supply Rule Proposal, *supra* note 12, at 91559. The Corps made this same point, often in very similar terms. See *id.* at 91562 (specific to WSA), *id.* at 91563 (both statutes), *id.* at 91564 (specific to Section 6), *id.* at 91576 (specific to WSA), *id.* at 91582 (both statutes), and *id.* at 91587 (both statutes).

135. *Id.* at 91563.

136. See *id.* at 91559, *id.* at 91582, and *id.* at 91587.

137. See *id.* at 91559 ("These users are exercising their separately-derived water rights, and they bear the sole responsibility to acquire and defend any water rights necessary to make withdrawals, in accordance with State or other applicable law.").

138. See *id.* at 91563.

139. *Id.* at 91590.



Corps generally did not obtain water rights in constructing and operating its projects.

Unlike other federal reservoirs that are operated for different purposes under other authority, such as reservoirs operated by the Department of the Interior pursuant to the federal reclamation laws, Congress has typically authorized the Corps to operate projects, through River and Harbors Acts and Flood Control Acts, for nonconsumptive purposes such as navigation, flood control, and hydropower generation. The operations of Corps projects for those purposes are not expected to interfere with the prerogatives of the States to allocate waters within their borders for consumptive use. . . . [T]he Corps 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. . . . Because purposes such as flood control, navigation, and hydropower at Corps reservoirs are carried out pursuant to the Commerce power, and are non-consumptive in nature, the Corps does not secure water rights for those operations.<sup>140</sup>

Although this language might suggest that no Corps reservoir ever has a water right under state law, this is apparently not true, although the Corps itself may not hold the water right.<sup>141</sup> Nothing in the Water Supply Rule proposal indicated that the Corps was considering any change in its practices regarding water rights for its reservoirs.

#### 4. Sovereign, stakeholder, and public involvement

Just as it emphasized its narrow role in water supply efforts, the

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140. *Id.* at 91563. The “Commerce Power” refers to Congress’ power under U.S. CONST. art. I, § 8, cl. 3.

141. In the western states, the Bureau of Reclamation may obtain irrigation water rights for what is otherwise a Corps project, as provided under Section 8 of the 1944 Flood Control Act, 43 U.S.C. § 390. For example, the Bureau holds water rights for irrigation storage at two Corps reservoirs in the Willamette Basin of Oregon. *See* Memorandum from Todd T. Semonite, Chief of Eng’rs, to the Sec’y of the Army (Dec. 18, 2019) (*available at* <https://usace.contentdm.oclc.org/utis/getfile/collection/p16021coll7/id/13272>) (last visited Aug. 5, 2021). In Nebraska, the Corps holds water rights under state law for storage in three of its reservoirs; “[t]he other 14 reservoirs have storage appropriations held by other federal, state, and county government agencies with [the Corps] still shown as the owner/operator of the dam.” Letter from Gordon W. Fassett, Director, Nebraska Dept. of Nat. Res., to U.S. Army Corps of Eng’rs (May 15, 2017). According to the State of Idaho, two Corps reservoirs have water rights held by the Bureau; for a third, Dworshak, the Corps sought recognition of its “water usage” rather than a water right under Idaho law, but retreated once that filing was viewed as a water right claim under state law. Idaho Comments to U.S. Army Corps of Eng’r on Rule Proposed to be Codified as 33 C.F.R. § 209.231, at 3 n.4 (*available at* <https://www.regulations.gov/comment/COE-2016-0016-0041>). These examples suggest that the Corps may prefer to have the Bureau or other entities hold water rights for Corps reservoirs and refuses to secure water rights in its own name under some but not all circumstances. *Id.*

Corps asserted its wide discretion in making decisions under the relevant statutes.<sup>142</sup> It claimed considerable latitude in making surplus water determinations under Section 6, so long as those amounts could be considered “surplus” to the needs of authorized project purposes.<sup>143</sup> In the same vein, the Corps disavowed any general quantitative thresholds for deciding whether a proposed reallocation would “seriously” affect project purposes or involve a “major” change, arguing that Congress had left this determination up to the Corps.<sup>144</sup> Thus, although the proposed rule included “procedures for coordinating with States, Tribes, and other federal agencies to ensure that water rights are protected and the views, expertise, and prerogatives of others are taken into account,”<sup>145</sup> it also showed the Corps’ intent to minimize constraints and maximize flexibility in making its decisions on water supply.

The Corps recognized that it could not allow any surplus water withdrawal under Section 6 that would harm “then existing lawful uses.”<sup>146</sup> Here, the Corps proposed that it “will coordinate with States, Tribes, and federal agencies, and will provide notice and opportunity for public comment,” to ensure that surplus water uses will not conflict with established or expected water rights.<sup>147</sup> The Corps stated its intent to “recognize and protect” Tribal and federal reserved water rights, including unquantified ones,<sup>148</sup> and also noted the need to ensure compliance with the CWA and ESA.<sup>149</sup> The proposed Water Supply Rule does not explain what is meant by “coordinate,” however, either as to the process to be followed or the effect of concerns or objections raised by states, tribes, or others.

In addressing its WSA authorities, the Corps said even less about

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142. See Water Supply Rule Proposal, *supra* note 12, at 91559 (“Section 6 and the WSA are discretionary statutes that authorized the Secretary of the Army to make Corps reservoirs available for water supply uses . . .”).

143. *Id.* at 91566 n.13 (referring to “Congress’ longstanding recognition that the Corps has inherent discretion to determine how its projects should be operated for their authorized purposes . . .”).

144. *Id.* at 91578.

145. *Id.* at 91556.

146. See generally *supra* nn.97–100 (examining proposed Water Supply Rule language on this point).

147. Water Supply Rule Proposal, *supra* note 12, at 91570; see also *id.* at 91589 (explaining that the proposal would require coordination with “interested Federal, State, and Tribal water resource agencies”).

148. *Id.* at 91570. It promised in a footnote to “coordinate surplus water determinations with the Department of the Interior and Tribal water resource agencies.” *Id.* at 91570 n.22.

149. *Id.* at 91570.

how it would seek and incorporate input from sovereigns or stakeholders in deciding whether to allocate reservoir storage to M&I water use. The proposal stated that the Corps would coordinate with the Bureau of Reclamation as to any reservoir that the two agencies co-manage regarding the potential effects of a reallocation.<sup>150</sup> Otherwise, the proposed Water Supply Rule simply provided that, “Prior to making a final determination” on reallocating reservoir storage under the WSA, “a written report shall be prepared explaining and documenting the basis for such determination. That report shall include an evaluation of any operational changes and impacts to authorized project purposes, and shall be coordinated with interested Federal, State, and Tribal water resource agencies.”<sup>151</sup> The proposed rule also required “public notice and comment” on the report but provided no details regarding contents or publication of the notice, or the amount of time allowed for comment.<sup>152</sup>

Under the Water Supply Rule as proposed, one type of entity would have the strongest and clearest participation rights: federal Power Marketing Administrations. If a project were authorized for hydropower, the Corps would not only “coordinate” with the relevant PMA, but also “utilize in its determinations any information that the PMA provides regarding potential impacts to the federal hydropower purpose, including revenues and benefits foregone.”<sup>153</sup> Thus, the Corps promised to incorporate PMA input into its decisions under either Section 6 or the WSA,<sup>154</sup> while offering only “coordination” to other federal agencies, states, and tribes.

The Corps did not directly address how it would consider potential impacts of a water supply decision on water uses such as recreation or fish habitat. Many of its reservoirs are authorized (and quite popular) for recreation, and the Corps would presumably consider “flatwater” recreational impacts on the reservoir itself in deciding whether a requested water supply use would affect that authorized purpose. Nothing in the proposed rule addresses that assumption, however, or says anything about whether or how the Corps might consider effects on river recreation below the reservoir. The same could be said regarding fish and wildlife, which is another common authorized

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150. *Id.* at 91579–80.

151. *Id.* at 91589.

152. *Id.*

153. *Id.* at 91573; *see also id.* at 91577 (very similar language regarding Corps’ use of information provided by PMA).

154. *Id.* at 91589.

purpose of Corps reservoirs. The preamble to the proposed rule refers generally to the ESA,<sup>155</sup> but says little about how the Corps would ensure ESA compliance in this context, and nothing about fish and wildlife other than listed species.<sup>156</sup>

### C. Criticism and withdrawal of the proposed rule

The proposed Water Supply Rule drew well over 100 comments, primarily from states, local governments, and hydropower interests.<sup>157</sup> A few environmental groups and tribal government entities also filed comments. Not surprisingly, a high percentage of comments came from within the territory of the Corps' Southwestern Division (where the agency is most heavily involved in water supply), or from entities located in the ACF or Missouri River Basins.

Although some expressed support for the stated goals of the rulemaking or for certain provisions, the overall tone of comments was mostly critical.<sup>158</sup> Perhaps the most fundamental disagreement, addressed below in Part IV, was over the Corps' authority over water within its reservoirs that could be considered "natural flows." Several comments, especially those from states, disagreed strongly with the Corps' conclusion that the rule would have no federalism implications.<sup>159</sup> The few comments from tribal governments raised

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155. The preamble mentions the ESA most directly as applied to Section 6 determinations. *See supra* n.91.

156. One comment on the proposed Water Supply Rule observed, "neither the word 'fish' nor the word 'wildlife' appear anywhere within the proposed rule or Federal Register Notice." Letter from Melissa Samet, Senior Water Res. Couns., Nat'l Wildlife Fed'n, *et al.*, to U.S. Army Corps of Eng'rs 7 (Aug. 18, 2017) (*available at* <https://www.regulations.gov/comment/COE-2016-0016-0085>).

157. According to the regulations.gov website, the proposed rule drew 179 comments. *Proposed Rule: Use of U.S. Army Corps of Engineers Reservoir Projects for Domestic, Municipal & Industrial Water Supply* (Dec. 16, 2016), <https://www.regulations.gov/document/COE-2016-0016-0001> (last visited July 19, 2021). Of this total, 130 comments are available online, although several of these were only requests for an extension of the comment deadline. *See id.*

158. *See, e.g.*, Letter from Noah Valenstein, Sec'y, Florida Dept. of Env't Prot., to U.S. Army Corps of Eng'rs (Nov. 16, 2017) (*available at* <https://www.regulations.gov/comment/COE-2016-0016-0110>); letter from Gordon W. Fassett, Director, Nebraska Dept. of Nat'l Res., to U.S. Army Corps of Eng'rs (May 15, 2017) (*available at* <https://www.regulations.gov/comment/COE-2016-0016-0044/>).

159. *See, e.g.*, Letter from Richard A. Hyde, Exec. Dir., Texas Comm'n on Env't. Quality, to U.S. Army Corps of Eng'rs (May 8, 2017) (*available at* <https://www.regulations.gov/comment/COE-2016-0016-0036>); letter from Richard E. Dunn, Dir., Georgia Env't Prot. Div., to U.S. Army Corps of Eng'rs (Nov. 16, 2017) (*available at* <https://www.regulations.gov/comment/COE-2016-0016-0117>).

similar concerns about the Corps' conclusions regarding tribes.<sup>160</sup> Many comments criticized the Corps for giving too little weight to their interests in its proposed approach to water supply decisions,<sup>161</sup> reflecting the reality that allocating a more-or-less fixed water supply from an existing reservoir is a zero-sum game.

A large number and wide range of commenters urged the Corps to withdraw the rule as proposed and engage in further discussions to address such concerns.<sup>162</sup> Given the breadth of opposition, the Water Supply Rule always faced an uncertain future, especially once the Trump Administration took over a few weeks after the proposed rule was published. The Corps extended the comment deadline three times,<sup>163</sup> then waited until early 2020 to announce that it would withdraw the proposed rule.<sup>164</sup>

The Corps was vague in explaining its reasons for pulling back the proposed rule, expressing its intent "to have a lighter federal touch" and address stakeholder concerns.<sup>165</sup> The ensuing *Federal Register* notice merely said cryptically that the proposed rule was being withdrawn due to "a policy determination by the Assistant Secretary of the Army (Civil Works) . . ."<sup>166</sup> Even in announcing withdrawal, however, the Corps seemed to acknowledge that the "long-standing policy issues" of water supply were not going away, and stated that it would use input from its "partners" to reassess these issues and find

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160. See, e.g., letter from William Kindle, President, Rosebud Sioux Tribe, to U.S. Army Corps of Eng'rs (May 15, 2017) (*available at* <https://www.regulations.gov/comment/COE-2016-0016-0066>); memorandum from Boyd Gourneau, Chairman, Lower Brule Sioux Tribe, to U.S. Army Corps of Eng'rs (Aug. 2017) (*available at* <https://www.regulations.gov/comment/COE-2016-0016-0095>).

161. See, e.g., Samet *supra* note 156; letter from Nicki Fuller, Exec. Dir., Sw. Power Res. Ass'n, to U.S. Army Corps of Eng'rs (Nov. 16, 2017) (*available at* <https://www.regulations.gov/comment/COE-2016-0016-0130>).

162. See, e.g., Fassett *supra* note 141; letter from Diane VanDe Hei, Chief Exec. Officer, Ass'n of Metro. Water Agencies, and G. Tracy Meehan III, Exec. Dir. of Gov't Affairs, Am. Water Works Ass'n, to U.S. Army Corps of Eng'rs (May 15, 2017) (*available at* <https://www.regulations.gov/comment/COE-2016-0016-0059>); Samet *supra* note 156.

163. Use of U.S. Army Corps of Engineers Reservoirs for Domestic, Municipal and Industrial Water Supply, 82 Fed. Reg. 9555 (Feb. 7, 2017) (extended from the original deadline of Feb. 14, 2017, to May 15, 2017); 82 Fed. Reg. 22452 (May 15, 2017) (extended to August 18, 2017); 82 Fed. Reg. 40085 (Aug. 24, 2017) (extended to Nov. 16, 2017).

164. Press Release, U.S. Army Public Affairs, U.S. Army Withdraws Water Supply Rule (Jan. 21, 2020) (*available at* [https://www.army.mil/article/231866/u\\_s\\_army\\_withdraws\\_water\\_supply\\_rule](https://www.army.mil/article/231866/u_s_army_withdraws_water_supply_rule)) (last visited July 19, 2021).

165. *Id.*

166. Water Supply Rule Withdrawal, *supra* note 84.

solutions.<sup>167</sup> The next two sections examine some of the key issues the Corps must address, including the dispute regarding the Corps' jurisdiction over "natural flows."

#### IV. DOES THE CORPS LACK JURISDICTION OVER "NATURAL FLOW" WATERS WITHIN ITS RESERVOIRS?

##### A. *The western states' argument: the states alone control "natural flows"*

Well in advance of the Corps proposing the Water Supply Rule, the states in the West were arguing that the Corps has no jurisdiction over some of the water contained in its reservoirs, because some of that water represents "natural flows" subject to exclusive state control. The argument focuses on a river's naturally occurring flow levels, which might give the impression that the states are seeking to protect their rivers' natural hydrograph and ecology.<sup>168</sup> To the contrary, they advocate for full state control over the amount of water that would exist in the river without the reservoir, leaving the state free to allocate that water for consumptive uses.

The states explain how they differentiate between "natural flows" and stored water:

Stored water does not encompass all of the water in a reservoir. To the contrary, it represents the difference between water flowing into a reservoir and the water flowing out of a reservoir. Stated another way, if more water flows into the reservoir than leaves the reservoir, this is captured as stored water. If less water flows into the reservoir than leaves the reservoir, this water supply represents the release of stored water. In either event, the natural flows that would exist absent the Corps' dams and reservoirs should not be considered stored water. Nor should the natural flows be subject to interference or require a contract or fee by the Corps to be appropriated by the states.<sup>169</sup>

Thus, the western states argue that the Corps has jurisdiction and

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167. U.S. Army Public Affairs *supra* note 164.

168. This impression would fit the original meaning of "natural flow" in water law, under which holders of riparian water rights were essentially entitled to receive – and also obligated to maintain – the natural flow of the river on which they were located. *See, e.g., Pyle v. Gilbert*, 265 S.E.2d 584, 586 (Ga. 1980) (explaining that Georgia historically followed the natural flow rule, under which each riparian landowner "has a natural and equal right to the use of the water which flows therein as it was wont to run, without diminution or alteration. . . . The plaintiff cannot divert or diminish the quantity of water which would naturally flow in the stream, so as to prejudice the rights of the defendants, without their consent.").

169. Letter from Phillip C. Ward, Chairman, W. States Water Council, to Jo-Ellen Darcy, Assistant Sec'y of the Army (Civil Works) (Aug. 6, 2013) (on file with author).

control only over water they regard as “stored,” and water they consider “natural flow” is exclusively within state jurisdiction even when that water is sitting in a lake behind a Corps dam. This position is based on a certain concept of the relationship between a river – specifically the Missouri – and mainstem reservoirs. According to the states, the Corps “improperly view[s] the Missouri River as a series of reservoirs connected by free-flowing rivers. The more correct view is that there are reservoirs sitting on top of portions of the River.”<sup>170</sup>

The states clearly and consistently make this argument in the context of surplus water determinations by the Corps under Section 6. “Western Governors assert that there is only one legally legitimate definition: any attempt to define ‘surplus water’ must exclude natural, historic flows from any quantification of waters subject to any USACE regulation.”<sup>171</sup> They appear to take the same position, albeit less forcefully, regarding the Corps’ decisions to allocate storage space under the WSA.<sup>172</sup> Nearly all of the western states to comment on the proposed Water Supply Rule contended that the Corps should not control access to waters considered “natural flows,”<sup>173</sup> although some appeared to limit this argument to surplus water determinations.<sup>174</sup>

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170. *Id.*

171. Letter from Steve Bullock, Governor of Montana and Chair, W. Governors Ass’n & Dennis Daugaard, Governor of S. Dakota and Vice Chair, W. Governors Ass’n, to U.S. Army Corps of Eng’rs (Feb. 27, 2017) (*available at* <https://www.regulations.gov/comment/COE-2016-0016-0025>) (last visited July 20, 2021).

172. *See id.* (“Additionally, natural flows should be exempt from any monetary charges imposed for water storage within [Corps] reservoirs. Such waters would exist within the streambed in the absence of [Corps] reservoirs and, therefore, should not be subject to federal management or the imposition of fees.”) Similarly, the Western States Water Council – which represents the governors of 18 western states on water issues – stressed the argument primarily in addressing surplus water determinations under Section 6. The Council’s comments acknowledged the Corps’ authority to charge for storage under the WSA, but asserted that not all the water in a Corps reservoir was stored, and charging a fee for access to natural flows would undermine state primacy. *See Ward, supra* note 164.

173. The Dakotas offered this argument most forcefully. Letter from Dennis Daugaard, Governor of S. Dakota, to U.S. Army Corps of Eng’rs (Mar. 15, 2017) (*available at* <https://www.regulations.gov/comment/COE-2016-0016-0027>) (describing the proposed surplus water definition as “a federal take-over of all our unappropriated natural flows” in the Missouri River; Letter from Doug Burgum, Governor of N. Dakota, to U.S. Army Corps of Eng’rs (May 11, 2017) (*available at* <https://www.regulations.gov/comment/COE-2016-0016-0043>) (describing the proposed surplus water definition as “unacceptable to North Dakota” and attaching an earlier letter from North Dakota’s State Engineer, *supra* note 63, calling the Corps’ surplus water initiative “an illegal taking of state water rights by an agency of the federal government”).

174. *See, e.g.,* Fassett, *supra* note 141; letter from Michael J. Teague, Oklahoma Sec’y of Energy and Env’t & Julie Cunningham, Exec. Dir., Oklahoma Water Res. Board, to U.S. Army Corps of Eng’rs (Apr. 21, 2017) (*available at* <https://www.regulations.gov/comment/COE-2016-0016-0029>).

As the “one legally legitimate definition” quote suggests, the western states are making a legal argument that the Corps lacks jurisdiction over water that they consider “natural flows.” They base this argument mostly on the principle of state primacy in allocating and developing water resources,<sup>175</sup> as reflected in policy statements contained in both the 1944 Flood Control Act<sup>176</sup> and the WSA.<sup>177</sup> Some of the state comments also invoked Supreme Court statements about Congressional deference to state water law,<sup>178</sup> or argued that state rights to water were Constitutionally protected by the Equal Footing Doctrine<sup>179</sup> or the Tenth Amendment.<sup>180</sup> Perhaps not surprisingly, only western states advanced this legal argument; a few non-western states commented on the proposed rule, but none asserted that the Corps lacks jurisdiction over the “natural flow” portion of the water contained within its reservoirs.<sup>181</sup>

*B. The Corps’ position: the law does not support excluding “natural flows”*

In proposing the Water Supply Rule, the Corps understood that its jurisdiction over “natural flows” would be contested, and it took on the argument directly in the preamble. It addressed the issue in the Section 6 portion of the rule, under its proposed definition of “surplus water,” and the rulemaking notice raised the possibility of an alternative definition that would exclude the natural flow component of the water in the mainstem Missouri River reservoirs.<sup>182</sup> The Corps noted that representatives of the Dakotas and Montana had argued

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175. See, e.g., Ward, *supra* note 169; Bullock, *supra* note 171.

176. See *supra* note 28 and accompanying text.

177. See *supra* note 39 and accompanying text.

178. See, e.g., Fassett, *supra* note 141; letter from Dennis Daugaard, Governor of S. Dakota, to U.S. Army Corps of Eng’rs (March 15, 2017) (available at <https://www.regulations.gov/comment/COE-2016-0016-0027>).

179. See, e.g., Ward *supra* note 64. Under the Equal Footing Doctrine, states gain title to the beds and banks of navigable waters when they achieve statehood, although the federal government retains some power over navigable waters themselves. See *PPL Montana, LLC v. Montana*, 565 U.S. 576, 590–91 (2012).

180. See Bullock *supra* note 171. (quoting U.S. CONST. amend. X, reserving to the states those powers not delegated to the federal government).

181. See, e.g., letter from Richard E. Dunn, Dir., Georgia Env’t Protection Div., to U.S. Army Corps of Eng’rs (Nov. 16, 2017) (available at <https://www.regulations.gov/comment/COE-2016-0016-0117>). Most notably, Texas’ comments strongly asserted state primacy and generally criticized the proposed rule but did not raise the argument about “natural flows.” Letter from Richard A. Hyde, Exec. Dir., Texas Comm’n on Env’t Quality, to U.S. Army Corps of Eng’rs (May 8, 2017) (available at <https://www.regulations.gov/comment/COE-2016-0016-0036>).

182. Water Supply Rule Proposal, *supra* note 12, at 91567–68.



that their citizens “should have unlimited access to the ‘natural flows’ of the Missouri River, and not be required to enter into a water supply contract or charged a fee for the water allocated from the ‘natural flows.’”<sup>183</sup> In response, the Corps requested comment on a definition that would carve out “natural flows,” but only for surplus water determinations and only on the Missouri.<sup>184</sup>

The Corps acknowledged that allocating water for beneficial uses is a state prerogative,<sup>185</sup> and that “some withdrawals that it may authorize from a Corps reservoir pursuant to Section 6 could have been made from the river in the absence of the Corps reservoir project, and in that sense may not be dependent on reservoir storage.”<sup>186</sup> The Corps disagreed, however, that the states’ argument on “natural flows” is the best reading of 1944 Flood Control Act.<sup>187</sup> Unlike the WSA, Section 6 says nothing about “stored” water, so the Corps believes it is irrelevant that a withdrawal from a reservoir does not rely on storage.<sup>188</sup>

Given the proviso in Section 6 requiring protection for “then existing lawful uses,” the Corps maintained that allowing unrestricted access to any water in its reservoirs – “natural flow” or not – would be contrary to a key purpose of the statute:

We believe that narrowly interpreting the term “surplus water” to enable the Corps to authorize only those withdrawals from its reservoirs that may be determined to utilize storage, as opposed to those withdrawals that could potentially have been accommodated from the natural flow of the river had the reservoir never been constructed, would frustrate Congress’s intent that the Corps should make surplus water available when doing so would not impair operations for authorized purposes or interfere with then existing lawful uses including the CWA, the ESA, and other federal statutes.<sup>189</sup>

Although the states had also argued that the Corps should allow free access to “natural flows” in implementing the WSA,<sup>190</sup> this issue was

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183. *Id.* at 91567.

184. *Id.* at 91568.

185. *Id.* at 91567.

186. *Id.* at 91565.

187. *Id.* at 91567.

188. “We believe that Congress intended, in enacting Section 6, that the Corps would authorize withdrawals for domestic or industrial uses of *any* amounts of water, if such withdrawals could be made in accordance with the terms of Section 6.” Water Supply Rule Proposal, *supra* note 12. at 91565 (emphasis in original).

189. *Id.*

190. See Ward, *supra* note 64 (arguing that the Corps was improperly using the WSA as “justification for denying access to natural flows,” opposing fees under the WSA for access to “natural flows,” and urging the Corps to “ensure that natural flows are not considered to be

not mentioned in the WSA portion of the Water Supply Rule preamble, indicating that the Corps saw this dispute as limited to Section 6 determinations.

*C. Analyzing the legal argument over “natural flows”*

The western states have argued vigorously for exclusive jurisdiction over “natural flows,” asserting that the Corps must exclude that portion of the water in its reservoirs from surplus water determinations. But there are fundamental problems with the states’ legal argument that the Corps lacks jurisdiction over some portion of the water within its reservoirs.

First, the states point to no language in the Flood Control Act itself that directly supports their position that they alone control access to “natural flows” found in Corps reservoirs. The statute does not refer to “natural flows” or any similar term or suggest that any portion of the water within a Corps reservoir is controlled exclusively by the relevant state; the text is silent on this point. In interpreting the law to require its approval for withdrawal of *any* water from its reservoirs, the Corps at least points to specific language in Section 6 that prohibits any surplus water contract that would harm “then existing lawful uses of such water.”<sup>191</sup>

The western states rely on the Flood Control Act’s statement of policy “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 . . . .”<sup>192</sup> But a general policy statement recognizing state rights and interests is very different from a specific limitation on Corps authority or jurisdiction, or a specific power granted to states in connection with water found in a federally authorized, owned, and operated project. Although the Flood Control Act does not give the Corps complete power over use of its reservoirs for water supply – Section 8 provides a limited role for the Bureau of Reclamation regarding irrigation uses<sup>193</sup> – the statute does not suggest that any use of water from a Corps project is solely within *state* control.

A Supreme Court decision on industrial use of water from one of the Corps’ Missouri River reservoirs – although not squarely on point – does not aid the states’ argument. That case, *ETSI Pipeline Project v.*

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surplus or stored water”).

191. Water Supply Rule Proposal, *supra* note 12, at 91565.

192. 33 U.S.C. § 701-1; *see supra* notes 29–30 and accompanying text.

193. Act of Dec. 22, 1944, ch. 665, § 8, 58 Stat. 887, 891, codified at 43 U.S.C. § 390.

*Missouri*,<sup>194</sup> involved a proposed pipeline that would transport coal in “slurry” form using water from the Corps’ Lake Oahe.<sup>195</sup> The pipeline developers, who had already obtained a water use permit from the State of South Dakota, obtained a contract for this industrial use from the Bureau of Reclamation without Corps approval.<sup>196</sup> The amount of water was a relatively small 20,000 acre-feet per year (from a reservoir with a capacity exceeding 23 million acre-feet), but three downstream states sued, arguing that the Bureau lacked authority to make such a contract.<sup>197</sup> The Supreme Court held unanimously that the contract was invalid because Sections 6 and 8 of the Flood Control Act clearly gave the relevant authority to the Corps.<sup>198</sup> Interpreting Section 6, the Court observed that “‘surplus water’ is all water that can be made available from the reservoir without adversely affecting other lawful uses of the water.”<sup>199</sup>

The *ETSI* case did not address the “natural flow” argument that the western states are now making and did not involve a challenge to a Corps decision under Section 6. Further, the Court noted in a footnote that the case did not involve “the relative interests of the United States and South Dakota in Lake Oahe water.”<sup>200</sup> The decision tends to undercut the states’ current argument, however, in two ways. First, the Court’s plain-language reading of Section 6 gives no hint that any water in a reservoir may be outside the Corps’ jurisdiction in making surplus water determinations. Second, and more fundamentally, there would have been no need for the litigation – or a federal contract from either the Bureau or the Corps – if “natural flows” were subject to exclusive state jurisdiction; South Dakota’s permit would have been the only approval needed to withdraw water for the pipeline project.<sup>201</sup>

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194. 484 U.S. 495 (1988).

195. For a brief history of the ETSI Pipeline Project, see Davidson, *supra* note 22, at 9–14.

196. ETSI Pipeline Project v. Missouri, 484 U.S. at 497–98.

197. *Id.*

198. *Id.* at 506.

199. *Id.*

200. *Id.* at 498 note 2.

201. This issue was raised in the Court of Appeals to challenge the standing of the plaintiff states. The argument was that since ETSI already had a state water right, the plaintiffs’ injuries could not be redressed by voiding the federal contract for Lake Oahe water. The court of appeals responded, “The fact that South Dakota granted ETSI the natural flow rights does not deny the states standing to challenge the contract allowing ETSI to withdraw water from the federal reservoir.” *State of Missouri v. Andrews*, 787 F.2d 270, 277 n.5 (8th Cir. 1986). The court noted that the parties “agree that loss of the federal water service contract would effectively undermine ETSI’s ability to undertake the planned coal slurry project.” *Id.* The court added the caveat, “Our decision in this case does not address the issue of South Dakota’s right, as against other states and the federal government, to allocate water within its borders.” *Id.*

Although the Flood Control Act includes a general policy statement recognizing state water authority (as many federal statutes do<sup>202</sup>), it contains nothing like the kind of mandate found in Section 8 of the Reclamation Act,<sup>203</sup> which directs the Secretary of the Interior “to proceed in conformity” with state laws “relating to the control, appropriation, use, or distribution of water used in irrigation . . .”<sup>204</sup> This specific provision was the focus of a key Supreme Court decision regarding federalism in water law, *California v. United States*.<sup>205</sup> Because the Court’s 1978 opinion contains sweeping language regarding Congressional deference to state water law,<sup>206</sup> it is often quoted in support of arguments favoring state control of water resources, as some states did in their comments on the Water Supply Rule.<sup>207</sup>

*California v. United States* has limited relevance for interpreting the Flood Control Act, however, as shown by the more recent Supreme Court case of *California v. FERC*.<sup>208</sup> The latter involved a license issued by the Federal Energy Regulatory Commission for a hydropower project on a stream in California; one requirement of that license was a required minimum flow below the project to protect fish and other aquatic life. FERC issued the license under the Federal Power Act (FPA), but California claimed authority to set a different (higher) minimum flow under state water law.<sup>209</sup> California argued that its authority to set its own minimum flow was preserved by Section 27 of the FPA, which declares that nothing in that statute “shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.”<sup>210</sup> California, supported by all 49

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202. See *United States v. New Mexico*, 438 U.S. 696, 702 n. 5 (1978) (referring to a list of “37 statutes in which Congress has expressly recognized the importance of deferring to state water law”).

203. Act of June 17, 1902, ch. 1093, § 8, 32 Stat. 388, 390.

204. 43 U.S.C. § 383.

205. 438 U.S. 645 (1978).

206. For example, “The history of the relationship between the Federal Government and the States in the reclamation of the arid lands of the Western States is both long and involved, but through it runs the consistent thread of purposeful and continued deference to state water law by Congress.” *Id.* at 653.

207. See *supra* note 169 and accompanying text.

208. *California v. Federal Energy Regulatory Comm’n*, 495 U.S. 490, 503–04 (1990).

209. *Id.* at 494–96. The key FPA provisions authorizing the license were 16 U.S.C. § 797(e) and 16 U.S.C. § 803(a).

210. *Id.* at 497 (quoting 16 U.S.C. § 821).

other states as *amici*,<sup>211</sup> argued that this provision – patterned after Section 8 of the Reclamation Act – should similarly be read as preserving state authority to regulate a federally-approved water project.<sup>212</sup> The Court unanimously disagreed, distinguishing *California v. United States* and upholding its own precedent interpreting FPA Section 27.<sup>213</sup>

Two aspects of *California v. FERC* are especially important in assessing the Flood Control Act. First, the Court emphasized that Section 8 of the Reclamation Act expressly requires federal compliance with state water laws, but “this language has no counterpart in § 27 of the FPA and was crucial to the Court’s interpretation of § 8” in *California v. United States*.<sup>214</sup> In addition, the Court noted that one difference between the two statutes is the “broader and more active federal oversight role” for FERC in hydropower licensing compared to the Bureau of Reclamation in irrigation development.<sup>215</sup> Given the absence of an affirmative command to the Corps like the one in Section 8, and the expansive role for the Corps in constructing and operating its projects for flood control, navigation and other national interests, the Flood Control Act seems much more analogous to the FPA than the Reclamation Act. In an earlier article examining federal water resource statutes I classified the FPA as giving relatively little deference to state water authorities;<sup>216</sup> while there are fewer cases addressing federalism issues under the Flood Control Act, it too appears to be a low-deference statute.

Perhaps the greatest state challenge to a Corps project involved the construction of Denison Dam on the Red River along the Texas-Oklahoma border.<sup>217</sup> Congress authorized the dam in 1938 for flood control and other purposes, with hydropower a key aspect of the project.<sup>218</sup> Oklahoma argued that Congress was exceeding its Commerce Clause power by authorizing a multi-purpose project, and the resulting reservoir would trample on Oklahoma’s sovereign rights

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211. *Id.* at 492 (listing all 49 states supporting California as *amici curiae*).

212. *Id.* at 503–04.

213. *See id.* at 498–503 (refusing to overrule *First Iowa Hydro-Electric Cooperative v. Federal Power Comm’n*, 328 U.S. 152 (1946)).

214. *Id.* at 504.

215. *Id.* at 504–05.

216. Reed D. Benson, *Deflating the Deference Myth: National Interests vs. State Authority under Federal Laws Affecting Water Use*, 2006 UTAH L. REV. 241, 285–94.

217. *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508 (1941).

218. *See id.* at 510 n.1 (quoting authorizing legislation), 513–14 (describing features of the reservoir).

in multiple ways.<sup>219</sup> In *Oklahoma ex rel. Phillips v. Guy F. Atkinson*, the Court unanimously rejected these arguments and upheld Congress' power to authorize a flood control project that was plainly for multiple purposes, saying that arguments against the scope of the project were primarily issues of policy.<sup>220</sup> Having found that Congress was within its Commerce power, the Court made short work of Oklahoma's argument that authorization of the dam was a violation of the Tenth Amendment.<sup>221</sup> Rejecting the last of Oklahoma's assertions about its sovereign rights, the Court declared: "And the suggestion that this project interferes with the state's own program for water development and conservation is likewise of no avail. That program must bow before the 'superior power' of Congress."<sup>222</sup> Although this decision predated the Flood Control Act and did not involve any issues of water supply from the reservoir,<sup>223</sup> nothing about it suggests that the Constitution gives the states exclusive control to the "natural flows" of their rivers within a Corps reservoir.<sup>224</sup>

Although the western states have a weak legal argument about the Corps' jurisdiction, they and others have raised important policy points that must be effectively addressed as the Corps moves forward with its water supply mission. The next section examines several of these issues and presents some general ideas for resolving them.

#### V. KEY POLICY ISSUES FOR THE CORPS IN PROVIDING NEW M&I WATER SUPPLY

Given considerable discretion to make water supply decisions under both Section 6 and the WSA, the Corps must set policy on a range of key issues. As noted above, the policies proposed in the Water

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219. *Id.* at 511–15, 528–29.

220. *Id.* at 516, 527–29.

221. In response to Oklahoma's argument, *id.* at 515, the Court concluded, "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." *Id.* at 534.

222. *Id.* at 534–35 (internal citations omitted).

223. Perhaps ironically, the reservoir formed by Denison Dam, Lake Texoma, would much later be the site of some of the Corps' biggest reallocations of storage for M&I water supply. STATUS AND CHALLENGES, *supra* note 4, at 20.

224. Neither does the Equal Footing Doctrine support the states' position that the federal government has no power to control their waters. The Supreme Court rejected this argument in *Arizona v. California*, 373 U.S. 546 (1963), and upheld the national government's power to reserve water for Indian Reservations and other federal lands. The Court explained that the cases on which Arizona relied "involved only the shores of and lands beneath navigable waters. They do not determine the problem before us and cannot be accepted as limiting the broad powers of the United States to regulate navigable waters under the Commerce Clause . . ." *Id.* at 597.

Supply Rule received mixed reviews at best from a wide range of commenters, prompting the Corps to withdraw the rule and reassess its positions. This section addresses a few of the key policy points the Corps must address regarding M&I water supply.

*A. The geographic scope of the rule*

In proposing the Water Supply Rule, the Corps made a fundamental choice to establish uniform policies at the national level regarding its water supply authorities. The Corps opted for a national approach despite several key differences between regions. These differences include water allocation systems under state laws and interstate compacts; the extent of demands for new or increased M&I water supply; the rights and interests of tribes relating to water; the significance of hydropower for project operations and regional energy supplies; and the nature of environmental concerns and requirements involving Corps reservoirs. A national policy could apply across that range of differences if it were sufficiently general, but such a policy might be too vague to provide much clarity, either for Corps personnel in the field or for other interested players.<sup>225</sup>

As a practical matter, the Corps may not need to establish policy at the national level. In practice, most of its reallocation activity has come in a single region, the Southwestern Division. Much of the controversy over the Corps' water supply decisions has arisen from two other areas, the Missouri and ACF river basins.<sup>226</sup> Although priority projects for reallocation studies can be found in several states, they are certainly not evenly distributed across the national landscape.<sup>227</sup> One could argue that the Corps should prioritize making policy for those parts of the country where important water supply decisions appear to be most imminent.

The Corps should rethink its national approach in favor of establishing policy at the regional level. One option would be writing rules for each Corps Division,<sup>228</sup> although some might be too big and

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225. For example, in response to the Corps' proposed approach to determining whether a proposed reallocation of storage would seriously affect project purposes or involve a major structural or operational change, *see supra* notes 116–22 and accompanying text, commenters on the Water Supply Rule criticized the proposal for giving no certainty to users and unfettered discretion to the Corps. *See* Valenstein, *supra* note 158; *and* Fassett, *supra* note 141.

226. The Corps has faced controversy and litigation in other areas, however, including a recent dispute over a significant reallocation of storage within its Willamette Basin reservoirs. *See supra* note 72.

227. *See supra* notes 43–47 and accompanying text.

228. STATUS AND CHALLENGES, *supra* note 4, at 4 (Figure 1-2).

diverse for one set of rules (see Figure 1); the Northwest Division, in particular, would seem to call for different rules for the Missouri and Columbia River Systems.<sup>229</sup> Such an approach would allow for policies tailored to the region's specific conditions and legal considerations, with greater involvement from sovereigns and stakeholders in the affected area. The effort could be completed over time, with lower-priority areas being done in later years. Although such an approach to policymaking might seem less efficient than a single nationwide rule, that may not be true if the national effort gets mired in controversy and litigation, as the proposed Water Supply Rule seemed sure to do.

### *B. The role of states and state law*

A common criticism of the Water Supply Rule was that the Corps did not adequately address state interests or involve state governments. One complaint was that the states had too little input into development of the proposed rule itself. A second, related concern was that the proposed rule did not adequately address the role of state law regarding water allocation and management.<sup>230</sup> The Corps' national approach surely contributed to both of these critiques.

One issue that exemplifies federal-state tensions over the Water Supply Rule was the proposed treatment of return flows for purposes of allocating reservoir storage under the WSA. The preamble contained an extended discussion of the issue, and the Corps noted that some users withdrawing water from Corps reservoirs had requested credit for the portion of their use that returned to the system. The Corps noted that it did not have a standard policy or practice on this issue, or on water storage accounting for its agreements under the WSA,<sup>231</sup> and it proposed a generally worded policy in the rule.<sup>232</sup> Several states commented specifically on this issue, and for a few the approach to this issue was perhaps the primary complaint with the proposed rule.<sup>233</sup>

The Corps could do better in addressing these kinds of complaints, and a regional or river-basin approach would help. Engaging more

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229. See *supra* note 4, at 3 (noting that two different Northwest Division offices manage reservoir operations, a unique arrangement for the Corps). The South Pacific Division might also require more than one rule given that it includes such large and disparate river basins as the Colorado, Sacramento, and much of the Rio Grande, among others.

230. See, e.g., Bullock, *supra* note 171; and Fassett, *supra* note 141.

231. Water Supply Rule Proposal, *supra* note 12, at 91580.

232. Water Supply Rule Proposal, *supra* note 12, at 91580–81, 91589.

233. Georgia and Texas, in particular, strongly objected that the Corps was proposing a policy that would contravene their state water law. Dunn, *supra* note 159; Hyde, *supra* note 159.



directly with more states would not only address states' concerns with the rulemaking process but would help identify issues – like return flows and storage accounting – that may call for a different approach than the Corps took in the Water Supply Rule. On matters such as return flows, where states have established relevant law, the Corps should think seriously about deferring to that law unless federal law or federal interests show the need for a uniform federal rule.<sup>234</sup> As to water rights generally, the Corps should clarify the circumstances under which it may obtain rights to store water in a reservoir,<sup>235</sup> and explain more fully why it generally declines to do so even under circumstances where state law would call for the Corps to obtain a storage right.

Although the Corps should establish policies that give state interests and state law a stronger voice in its water supply decisions, it must also address the special challenges posed by interstate river systems. States have a history of fighting with each other and with the Corps over water allocation and management on interstate rivers, as shown by the extended disputes on the Missouri and the ACF. On interstate rivers, the Corps must address the competition and potential conflict over water resources by ensuring that all affected states have an adequate opportunity to participate in its decisions.<sup>236</sup> This will be especially challenging in basins such as the Missouri and ACF, where there is no meaningful legal or institutional framework that could assist the Corps and the states in resolving these difficult issues. Where no interstate compact or Supreme Court apportionment decree exists, the Corps must ensure that its water supply and management decisions do not end up becoming a default apportionment of a shared river.<sup>237</sup>

### *C. The role of tribes and tribal water rights*

Relatively few Indigenous tribes commented on the Water Supply Rule, but those that did raised some of the same kinds of concerns that

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234. For a fully developed argument that the Corps should be more deferential to states in water supply matters, *see generally* Abrams, *supra* note 1.

235. As noted above, the Corps' usual policy of "we don't do water rights" may not apply to the same way at every reservoir. *See supra* note 134 and accompanying text.

236. Florida, acutely aggrieved over the Lake Lanier reallocation, raised this concern very prominently in commenting on the Water Supply Rule. Valenstein, *supra* note 158.

237. *See* Abrams, *supra* note 1, at 419–26 (criticizing the approach in the ACF basin and proposing alternatives); Reed D. Benson, *Can a State's Water Rights Be Dammed? Environmental Flows and Federal Dams in the Supreme Court*, 8 MICH. J. ENV'T & ADMIN. L. 371, 402–08 (2019) (arguing that Corps decisions on reservoir operations must not frustrate a state's right to its equitable share of an interstate river).

states did. Tribes objected to the Corps' statement that the proposed rule had "no tribal implications"<sup>238</sup> much as the states criticized the similar statement of "no federalism implications."<sup>239</sup> Tribes criticized both the process and the substance of the proposed rule, stating that they had been inadequately consulted on the rulemaking and that the Corps' proposed policies were contrary to their interests. Some of the Corps' shortcomings regarding states seem to apply even more strongly to tribes, especially since state participation in the rulemaking far exceeded that of tribes.<sup>240</sup>

The similarities only go so far, however, as the Corps has responsibilities to tribes that do not extend to states. First, tribes claim water rights for their reservations under the *Winters* doctrine, which provides water rights based on federal law for enough water to fulfill the purpose(s) of the reservation.<sup>241</sup> Many tribal water rights have not been confirmed or quantified, however, as they await either adjudication or settlement; the latter has become the preferred approach for determining tribal reserved rights under *Winters*.<sup>242</sup> Second, the United States government has a trust responsibility to tribes, which extends to protection of the tribes' *Winters* rights.<sup>243</sup> In proposing the Water Supply rule the Corps acknowledged its duty to "recognize and protect" tribal reserved rights, including unquantified ones, but gave no indication of how it would accomplish this under Section 6 and no similar assurance regarding storage allocation under the WSA.<sup>244</sup>

Establishing water supply policies on a smaller scale would help the Corps better engage with tribes, and for any decision that could affect a tribe's interests or rights, the Corps must provide government-

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238. See *supra* note 152 and accompanying text.

239. See *supra* notes 86–87 and accompanying text.

240. More than ten individual states from across the country filed comments on the Water Supply Rule, along with the Western Governors Association and the Western States Water Council. By contrast, the Corps received only three comment letters from tribal government interests, all from within South Dakota. While this does not show that the Corps made more of an effort to engage states than tribes, it strongly suggests that tribal voices and interests were not adequately heard in the development of the Water Supply Rule, at least not through the standard notice-and-comment channel.

241. See *Arizona v. California*, 373 U.S. 546, 595–601 (1963), applying *Winters v. United States*, 207 U.S. 564 (1908).

242. See CHARLES V. STERN, CONG. RESEARCH SERVICE, INDIAN WATER SETTLEMENTS 1-2, CRS Report R44148 (2020).

243. *Navajo Nation v. Dept. of the Interior*, 996 F.3d 623, 639–43 (9th Cir. 2020) (finding a trust duty in the Interior Department to protect the Navajo Nation's unquantified *Winters* rights to water in the Colorado River).

244. See *supra* notes 134–44 and accompanying text.

to-government consultation.<sup>245</sup> These policies should provide uniform protection for tribal water rights whether the Corps is applying Section 6 or the WSA. And while the Corps is right to recognize unquantified rights,<sup>246</sup> there will be intense controversy over any attempt to estimate the size, scope or priority of such rights.

#### *D. Categories of water withdrawals*

Despite all the criticism over its proposal, the Corps got some things right in the Water Supply Rule, including its statement of the different purposes of its M&I water supply statutes. The WSA is the right authority for long-term or permanent water uses that need the kind of reliability provided by storage, while Section 6 is suited to allowing water use “provisionally.”<sup>247</sup> This distinction suggests that surplus water agreements should normally be limited to temporary uses – current Corps guidance states that such agreements should typically last no more than 5 years<sup>248</sup> – or uses that are so small relative to the available water that they will never have any discernable effect on project operations or existing uses.

The proposed rule threatened to blur this distinction, however, by eliminating any general time limit on surplus water agreements.<sup>249</sup> The Corps reasoned that because the statute contains no general time limit on surplus water agreements, its policies do not need one either. Although acknowledging that “some time limitations are necessary” because circumstances change over time, the proposed rule stated only a general principle that surplus water contracts be issued for a limited time, while adding that they could be extended or renewed upon request if surplus water were still on hand.<sup>250</sup> By discarding the general five-year limit and allowing for longer-term contracts for surplus water, the Corps proposed to expand the range of uses approved under Section 6, potentially asking for trouble by allowing more-or-less permanent uses to become dependent on less-than-permanent agreements. The longer such uses continue, the more likely they are to conflict with other water needs – possibly including unquantified

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245. See Exec. Order No. 13,175, 65 Fed. Reg. 67249 (Nov. 6, 2000).

246. See generally *Joint Board of Control of Flathead, Mission and Jocko Irrigation Dists. v. United States*, 832 F.2d 1127, 1132 (9th Cir. 1987), cert. denied, 486 U.S. 1007 (1988).

247. See *supra* notes 90–91 and accompanying text; Water Supply Rule Proposal, *supra* note 12, at 91590.

248. See Water Supply Rule Proposal, *supra* note 12, at 91574 (citing Corps guidance).

249. Water Supply Rule Proposal, *supra* note 12, at 91574.

250. Water Supply Rule Proposal, *supra* note 12, at 91574.

and/or undeveloped tribal rights – that could require more water in the future than they do today.

As for the WSA, the Corps proposed to continue using it for long-term uses that require a dependable supply,<sup>251</sup> which presumably covers most major M&I water supply requests. Because the WSA is the preferred legal tool for these important uses, it should have the most robust policy framework for addressing the kinds of concerns that could arise from a proposed long-term reallocation of storage. In its proposed Water Supply Rule, however, the Corps said very little about how such concerns – other than potential impacts on hydropower generation – would be addressed, or how potentially affected entities could participate effectively in the Corps' decisions on allocation of storage. Having acknowledged the need to address tribal and environmental water requirements in making surplus water determinations,<sup>252</sup> the Corps needs to be more specific, not less, on how it will protect these interests in making long-term decisions under the WSA.

Although the Corps proposed giving itself maximum discretion in the Water Supply Rule, there may be benefits to structuring that discretion. The Corps should consider establishing levels or volumes of water withdrawals – phrased in terms of absolute quantity, percentage of storage in a reservoir, or both – each of which would involve a defined level of agency analysis and public involvement. Very minor withdrawals should be eligible for approval with minimal scrutiny, while additional process would be required for those that exceed an objective threshold. The Corps should also restore some objective criteria for triggering, at least presumptively, the requirement for Congressional approval of a proposed reallocation.<sup>253</sup> Perhaps such criteria could be more flexible or nuanced than the old standard (the lesser of 50,000 acre-feet or 15% of storage), but they should certainly be clearer and more predictable than the Corps' nebulous and subjective test based on perceived Congressional intent.<sup>254</sup>

For significant withdrawals, the Corps must ensure that its own analysis is robust, with adequate review of potential impacts of the proposed reallocation. The Corps must ensure that it is considering a range of alternatives to the proposed request and assessing the potential impacts of each, based not just on historical conditions but

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251. Water Supply Rule Proposal, *supra* note 12, at 91581, 91590.

252. *See supra* notes 93–99 and accompanying text.

253. *See supra* notes 116–22 and accompanying text.

254. Water Supply Rule Proposal, *supra* note 12, at 91578.

also on future conditions as they are likely to be altered by climate change. For any proposed reallocation that could have a meaningful impact<sup>255</sup> – not just on reservoir operations or authorized purposes, but on any important water-related interest that could be affected – the Corps should approve reallocation of reservoir storage only in connection with a revision of the water control plan for the project.<sup>256</sup> Although this requirement could mean that any long-term reallocation of storage for M&I water use takes longer and costs more, it would ensure that such a major decision is fully reviewed and vetted, based on updated information about project operations and expected climate change impacts.

*E. Environmental issues (including environmental review)*

Although the proposed Water Supply Rule said remarkably little about environmental issues associated with M&I water supply from Corps reservoirs, these issues are likely to be important for almost any significant new or increased withdrawal. Whether using Section 6 or the WSA to make water available from its reservoirs, the Corps will need to ensure that its actions are consistent with the environmental review requirements of the National Environmental Policy Act (NEPA)<sup>257</sup> and the substantive and procedural mandates of ESA Section 7.<sup>258</sup>

Establishing some objective criteria for proposed withdrawals, with proportionally bigger ones undergoing a more extensive process, should help the Corps tailor the level of NEPA reviews to the potential significance of the proposed action. A Categorical Exclusion<sup>259</sup> could be appropriate for the lowest level, while an Environmental

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255. By this I mean an impact that would not necessarily qualify as a “serious” effect on project purposes or a “major” structural or operational change under the WSA, however those terms are defined.

256. See Water Supply Rule Proposal, *supra* note 12, at 91563 (describing water control plans and manuals). For more information on the Corps’ policies and practices regarding water control plans, see Reed D. Benson, *Reviewing Reservoir Operations: Can Federal Water Projects Adapt to Change?*, 42 COLUM. J. ENV’T. L. 353, 384–87 (2017).

257. 42 U.S.C. § 4332(2)(C) (requiring federal agencies to prepare an environmental impact statement on any proposed action that could significantly affect environmental quality).

258. 16 U.S.C. § 1536(a)(2) (requiring federal agencies to ensure that their actions do not jeopardize any listed species, and to consult on the potential impacts of a proposed action on listed species).

259. Under the NEPA implementing rules, categorical exclusions are limited to those actions which do not individually or cumulatively have significant environmental effects. 40 C.F.R. § 1508.1(d). A categorical exclusion typically provides quick and easy NEPA compliance, which may be in the form of a checklist.

Assessment (EA)<sup>260</sup> should suffice for most others; for better or worse the courts have generally been reluctant to order a full Environmental Impact Statement<sup>261</sup> when the Corps (or Bureau of Reclamation) is considering a change to reservoir operations.<sup>262</sup> NEPA compliance will not ensure that the Corps fully addresses environmental concerns associated with a proposed withdrawal, but it provides a well-established framework for identification of alternatives, assessment of environmental impacts, and public participation.<sup>263</sup> And because compliance can be challenged in court, NEPA provides a modest but important measure of accountability as the Corps makes its discretionary decisions.

Although the Water Supply Rule mentioned addressing CWA and ESA requirements in connection with surplus water decisions, the Corps' water supply policies must go beyond these minimum requirements, providing stronger and more comprehensive environmental protection. The Corps should engage potentially interested fish and wildlife agencies – federal, tribal, and state – regarding the potential impacts of a proposed withdrawal.<sup>264</sup> Its policies should ensure protection of state-established instream flow levels below its reservoirs, whether or not those levels have the status of water rights. And the Corps should consider potential impacts of a proposed withdrawal on fish and wildlife, endangered or not, even if the project is not specifically authorized for that purpose; after all, Congress has already established “environmental protection as one of the primary missions of the Corps” in project operations.<sup>265</sup>

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260. *Id.* § 1508.1(h). An agency typically prepares an EA when it is considering an action that it expects to have less-than-significant environmental impacts, sometimes based on mitigation measures. Nearly every EA results in an agency finding of no significant impact, or FONSI.

261. The EIS is the most detailed and thorough type of NEPA review, for actions that could have significant environmental impacts. *Id.* § 1502.

262. *See Idaho Cons. League v. Bonneville Power Admin.*, 826 F.3d 1173 (9th Cir. 2016) (allowing the Corps to change reservoir operations based on EA); *Center for Env't Law & Pol'y v. Bureau of Reclamation*, 655 F.3d 1000 (9th Cir. 2012) (allowing the Bureau to proceed with reallocation of reservoir storage based on an EA).

263. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

264. The proposed Water Supply Rule would have required the Corps to coordinate “with interested Federal, State, and Tribal water resource agencies” in making its decisions on water withdrawals but contained no similar requirement or indication that the Corps would coordinate with fish and wildlife agencies. Water Supply Rule Proposal, *supra* note 12, at 91589.

265. 33 U.S.C. § 2316(a). One court, at least, has held that this statute imposes a judicially reviewable duty on the Corps regarding its existing projects. *Raymond Proffitt Found. v. U.S. Army Corps of Eng'rs*, 343 F.3d 199, 205 (3d Cir. 2003).

### *F. Concluding thoughts on Corps water supply policies*

In proposing the Water Supply Rule, the Corps stated its positions on a variety of issues but offered few if any details on its priorities or the criteria it would use to make decisions. It was somewhat more specific on certain issues, such as assessing a proposed withdrawal's potential effects on hydropower<sup>266</sup> and the approach to pricing for water supply arrangements.<sup>267</sup> While these are major factors for hydropower customers and would-be water users, the Corps did not equally address key concerns of other important players – tribes, states, environmental groups, recreational users, and neighboring communities, to name just a few.

The Corps' basic philosophy in the Water Supply Rule seems to have been retaining as much discretion as the statutes would allow,<sup>268</sup> while limiting its commitments regarding the issues it would consider and the entities it would work with in making decisions. That approach makes sense from the standpoint of an agency that wants to make decisions as inexpensively and efficiently as possible in response to local demands. But it offers little assurance to sovereigns, stakeholders, or citizens who do not trust the Corps to listen to their concerns or protect their interests.

The Corps is used to exercising – although not always enjoying<sup>269</sup> – a great deal of discretion in operating its reservoirs. That discretion extends to M&I water supply arrangements under Section 6 and the WSA, but exercising that discretion may bring the Corps under fire from many sides, as seen in the disputes over Lake Lanier and the Missouri River reservoirs. In making decisions about new water withdrawals from existing reservoirs, the Corps sets up a zero-sum game that may be fiercely contested by a wide range of players. The policy framework should clarify the rules for all those players and Corps decision-makers, directing the agency's discretion and providing for meaningful participation.

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266. See *supra* note 145, and accompanying text.

267. See *supra* notes 100–03 (Section 6), 112–15 (WSA), and accompanying text.

268. On at least one issue – the authority to make water available for any purpose except irrigation – the Corps may have claimed even *more* discretion than the statutory text allows. See *supra* note 106, and accompanying text.

269. The Corps has sometimes sought to *minimize* its discretion, especially for purposes of reducing the scope of its consultation requirements under ESA Section 7. See, e.g., *WildEarth Guardians v. U.S. Army Corp of Eng'rs*, 947 F.3d 635, 640–42 (10th Cir. 2020) (describing how Corps findings reduced its discretion in operating reservoirs on the Rio Grande, effectively freeing the Corps from the duty to consult under the ESA).

## VI. CONCLUSION

The Water Supply Rule is dead, but the issues it raised are very much alive. The Corps faces disputes regarding its jurisdiction over “natural flows,” its WSA authorities, and its role in water supply and management. These issues are likely to keep getting tougher; as the Corps stated in 2016, “Steadily increasing demands for limited supplies of water at Corps reservoirs, interstate conflicts over water use, and pressures from drought, environmental changes, and aging infrastructure are expected to intensify all of the above concerns.”<sup>270</sup>

The Corps must now revisit these issues in reporting to Congress on whether to make water supply a primary mission of the agency. The existing water supply mission is sizable, involving almost 10 million acre-feet of storage space and 140 reservoirs. The Corps has authority for approving new M&I water withdrawals from its reservoirs, and a process – ongoing in many places across the country – for considering reallocation of storage space for this purpose. As more potential users look to its reservoirs for water, the Corps will be forced to make high-stakes decisions on finite supplies and storage space, often in the midst of fierce conflicts among competing players fighting to protect their interests.

The right policies, developed at the right level, will help the Corps carry out this contentious mission. Such policies should specify the standards and criteria for water supply decisions, setting some limits on the Corps’ discretion for the sake of clarity and predictability. The Water Supply Rule fell short on several key issues, and the Corps must do better in providing a strong role for states and tribes, protecting environmental values, and providing meaningful public involvement. And decisions on Corps reservoirs, especially long-term storage reallocations, must be informed by the best available science on the likely impacts of climate change. As the Corps’ water supply mission becomes ever more important and difficult, getting these things right is primary.

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270. Water Supply Rule Proposal, *supra* note 12, at 91558.





Figure 1: Map of Corps of Engineers Divisions