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STATE OF SOUTH DAKOTA

August 27, 2012

Colonel Anthony C. Funkhouser
Commander, Northwest Division
U.S. Army Corps of Engineers
P.O. Box 2870
Portland, OR 97208-2870

Dear Colonel Funkhouser,

As South Dakota's Attorney General, I am disappointed with the Corps of Engineers' proposal to restrict access to and charge a fee for natural water flows in the Missouri River. This proposal, whether disguised as reallocation or surplus water, exceeds the Corps' regulatory authority and violates basic principles of federalism. I hope that you accept this invitation to reverse the decision to charge South Dakotans for their own water in contradiction of well-settled legal and historical precedent.

Prior to South Dakota's statehood, the United States held the Missouri River in trust for the benefit of the future states including South Dakota. The United States Supreme Court has repeatedly recognized that while the federal government maintains a "navigational servitude," navigable rivers like the Missouri are a fundamental attribute of state sovereignty. Indeed, the Supreme Court recently made clear that under accepted principles of federalism, the states retain residual power to determine the scope of the public trust over waters within their borders. Consistent with federal law, in 1905 the South Dakota Legislature declared that all waters within the State belonged to the people and are held in trust for the benefit of the public.

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Congress has provided the Corps with important responsibilities on the Missouri River, which include flood control, a responsibility deservedly requiring attention after last summer's flooding experience. However, Congress has always limited the Corps' regulatory authority to give way to the long-established and legally recognized state water rights. A germane example of this limited grant of authority is emphasized in the Flood Control Act of 1944 and Water Supply Act of 1958.

I am therefore perplexed by the Corps' reliance upon either Act to charge the State for the right to use waters which would be available even without the reservoirs.[1] The Flood Control Act itself establishes:

> It is hereby declared to be the policy of the Congress to recognize the interests and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control....[2]

The legislative history should resolve any further question as to Congress' direction under the Flood Control Act. As stated by Vermont Senator Austin during the passage of the Act:

> The reason why we have insisted upon preserving the Federal system, with State autonomy well protected against encroachment by an ever-growing Central Government, is that we have learned by experience....[3]

The following provision of Section 6 of the Flood Control Act makes it clear that the federal government is a mere storer of water, rather than a proprietor:

> P*rovided*, That no contracts for such water shall adversely affect then existing lawful uses of such water.

Accordingly, the recent attempt to mandate water contracts that adversely affect existing lawful state uses and water permits constitutes a direct regulatory action without Congressional

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[1] See also Town of Smyrna, Tennessee v. United States Army Corps of Engineers, 517 F.Supp.2d 1026 (M.D. Tenn. 2007) (determining Corps exceeded its authority under the Water Supply Act of 1958, in attempting to charge water supply storage in absence of pre-construction cost-sharing agreement).
[2] Flood Control Act of 1944, Preamble, Pub.L. No. 78-534, Ch. 665, 58 Stat. 887
[3] 90 CONG. REC. §8492 (DAILY ED. Nov. 28, 1944).

authority. While it is neither just nor legal for the Corps to demand that we receive permission to use water that naturally flows through our state, it borders on insult to demand that we pay for it.

Access to Missouri River water is critical for South Dakota farms, businesses, tribes and municipalities. It is important to recognize that while the Corps built dams, it did not put natural flows into or through the Missouri River Valley. Congress has recognized that "South Dakota, under the original Pick-Sloan Plan, was to receive 972,510 acres of irrigated land in return for the 536,875 acres it sacrificed for the mainstream dams."[4] The House Agriculture Committee report went on to state that "the Federal Government made a commitment to the State of South Dakota which it has not honored."[5] Rather than honoring the federal promises, the Corps is proposing to exceed its Congressional directive and charge a fee to use what is legally and historically ours.

I am respectfully requesting that the Corps follow the rule of law and refrain from mandating fees for use of South Dakota's water. For the record there should be no doubt that the State of South Dakota intends to ensure its lawful authority over and ownership of the water that belongs to us.

Sincerely,

Marty J. Jackley
ATTORNEY GENERAL

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[4] H.R. Rep. No. 97-524, Part 2, 97th Cong., 2d Sess 4 C1982
[5] Id.