North Dakota State Water Commission

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October 10, 2012

U.S. Army Corps of Engineers, Omaha District CENWO-OD-T
ATTN - Surplus Water Reports and EA
1616 Capitol Avenue
Omaha, NE 68102-4901

Dear Colonel Cross:

This letter presents comments from North Dakota's Office of the State Engineer and the State Water Commission regarding the August 2012 Surplus Water Report and the appended Draft Environmental Assessment for Oahe Dam/Lake Oahe, and generally for all of the surplus water reports issued for the Missouri River basin.

This letter and attached comments do not imply an endorsement of any of the surplus water reports. In fact, I consider the entire surplus storage initiative to be an illegal taking of state water rights by a federal agency, and a violation of the Commerce Clause of the United States Constitution, and Tenth and Fourteenth Amendments to the Constitution.

The actions the United States Army Corps of Engineers (Corps) have taken since May 2010 to deny access and charge for access to Missouri River water flowing through the Missouri River mainstem reservoirs are wrong. The upper Missouri River basin states and tribes have sacrificed greatly in loss of land and resources, and its citizens have suffered personal hardship for the construction of these reservoirs in the Missouri River basin. Most of the promised benefits for the upper basin states and tribes have never been realized. Now, to add to the injustice, the Corps presumes to require payment for access to natural flows, simply because those flows lie within the boundaries of the reservoirs. The natural flows of the Missouri River belong to the states for the beneficial use of their citizens, and as long as natural flows are sufficient, the reservoirs provide no service to water users and, in fact, impede their access to the states' waters.

I am opposed to the Corps requiring payment from water users to withdraw water from the Missouri River within the boundaries of the lands taken for the mainstem reservoirs. The Surplus Water Report maintains that the intent is to charge for "surplus storage" in the reservoirs by requiring water storage contracts as a condition for an easement to construct intake works on Corps' property. In so doing, the Corps is obstructing access to, and use of, Missouri River natural flows, which are the waters owned by the people of Missouri River states. As the chief officer of the state agency responsible for the appropriation of North Dakota's waters, I want to be clear that the Corps does not have the legal or Constitutional authority to encumber our appropriations for beneficial uses in this manner.

The Corps, through the Surplus Water Report process, is clearly challenging the State of North Dakota and basin states' rights to access their natural flows.

The choice being presented to the regions most impacted by the construction of the reservoirs is either: 1) no water access, or 2) incurring additional costs for water access, even when the original benefits of water supply for the state have never been fully realized. Any reference in the report that the State of North Dakota's preferred alternative for water supply is use of "surplus water" is incorrect. North Dakota's preferred option, and we maintain our legitimate right, is water supply from the natural flows of the Missouri River accessed through a Corps land easement.

The Corps first halted access to Missouri River water in North Dakota in May 2010, when it refused to issue an easement to the South Central Water District for a drinking water intake. After the Bureau of Reclamation provided an exhaustive briefing of the Garrison Diversion legislative history, which amended the Flood Control Act of 1944, the Corps finally acknowledged the South Central project would not require a water storage contract, and an easement was issued. This was the first attempt by the Corps to misapply the need for storage contracts in North Dakota and delay projects that would benefit the state.

The Corps has refused to process any further easement applications and issued the Surplus Water Report based on Real Estate Policy Guidance Letter Number 26. That policy states, *"...no easement that supports any type of water supply agreement will be executed prior to the water supply agreement being executed by all parties..."* The Corps' current assumption is that all requests for easements to Missouri River mainstem reservoirs need to use stored water. This is entirely wrong. The natural flows are nowhere near being fully appropriated. Due to the availability of natural flows, which North Dakota and the tribes within North Dakota have a pre-existing right to, water storage agreements are not needed. This should also be the case for other affected Missouri River basin states. The Corps must recognize that any easement requests currently before them do not require the Corps to operate the system to provide the water. Thus, the current real estate policy does not apply and will never apply when the water used is within the natural flows. For these reasons, the requested easements should be processed immediately without requiring a storage contract.

The Corps is ignoring both federal and North Dakota state constitutional rights. The Tenth Amendment of the United States Constitution states, *"The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."* Article XVII, § 210 (1889) of the North Dakota Constitution, which was ratified by the U.S. Congress states, *"[a]ll flowing streams and natural watercourses shall forever remain the property of the state...."* Furthermore, the 1944 Flood Control Act states in its preamble,

> *"...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, as herein authorized to preserve and protect to the*

fullest possible extent established and potential uses, for all purposes, of the waters of the Nation's rivers[.]"

Prior to construction of the dams, the Missouri River in North Dakota was a free flowing river with natural flows year-round. Accordingly, waters of the Missouri River belong to the public and are subject to appropriation by basin states for beneficial uses.

Quoting from House Document 325 (4 Feb. 1960), which was supporting documentation in the 1965 amendments to the 1944 Flood Control Act:

A large source of additional water is a recognized need everywhere east of the Missouri River in the Dakotas. The Missouri is the only available source of such a supply. On the main stem near Williston N.Dak, at the head of Garrison Reservoir, historic annual river flows have, since 1898, varied between 25,800,000 and 9,150,000 acre-feet with an average of 17,600,000 acre-feet.

This is federal recognition that the natural flows in the Missouri River constitute a large volume of water, some of which can be put to beneficial use by the people of North Dakota.

North Dakota has always maintained its right to use Missouri River water within its boundaries. This was acknowledged in the development of the Garrison Diversion Unit Reformulation Act of 1986, which also amended the 1944 Flood Control Act. Congress declared that one of the purposes of this act is to *"preserve any existing rights of the State of North Dakota to use water from the Missouri River."* Congress also stated, *"[n]othing in this Act shall be deemed to diminish the quantity of water from the Missouri River which the State of North Dakota may beneficially use... ."* The legislative history has been to protect beneficial use in basin states; it has not been to deny, restrict, and obstruct access.

The Corps' acknowledgement of the legitimacy of states' rights to natural flows was confirmed by the attached letters of acting Assistant Secretary of the Army Robert Dawson to Senator Quentin Burdick (2 Aug 1985) and South Dakota Congressman Tom Daschle (2 Aug 1985) in reference to a previous attempt by the Corps to charge for withdrawals from Lake Sakakawea and Lake Oahe.

From Dawson to Burdick:

As you explained during our meetings on this subject, it is not clear that withdrawals do benefit from the storage pool of Lake Sakakawea.

Because of this uncertainty, the Corps of Engineers has embarked on a study to determine yield thresholds for each of the main stem Missouri River reservoirs at which reliable water supplies would require storage.

Unfortunately, since the study described above involves complex issues and requires extensive coordination with State and local officials, we do not expect it to be completed prior to the middle of 1987. Because some needs must be

met much sooner than that date, we are actively seeking an interim solution within exiting authorities that will allow withdrawals to begin immediately at no cost.

And from Dawson to Daschle:

We feel that it is especially important in this time of national fiscal concern for the Department of the Army to conscientiously pursue recovery of past water project investments from project beneficiaries as required by law. However, as indicated in your letter [13 June 1985], it is not clear that the WEB Project does benefit from the storage pool of Lake Oahe.

The Dawson letters tacitly acknowledge states' rights to allocate natural flows, and further acknowledge legitimate doubts about the need for storage for many uses. In exempting new uses from storage fees until the benefits of storage are defined, the letters also acknowledge the necessity for establishing storage benefits before storage charges can be levied. However, the study promised to Senator Burdick and Congressman Daschle never materialized, nor am I aware of subsequent communication on the matter with the states. Having never resolved the question, the Corps is now attempting to sidestep the issue and take control of the water by limiting land access. The Corps should honor its commitment to complete the natural flow study and allow withdrawals without storage contracts to resume immediately.

Furthermore, in a (13 March 1986) memorandum for the Assistant Secretary of the Army, from Susan J. Crawford, Department of the Army Office of the General Counsel, regarding proposed contracts for municipal and industrial (M&I) water withdrawals from mainstem Missouri River reservoirs, it was stated:

The contracts provide that at a future date Parshall and [North Dakota State Water Commission] NDSWC will agree to pay reasonable consideration based on benefits received. It is my understanding that the consideration will amount to a charge for reservoir storage needed to fulfill the withdrawal demands of Parshall and NDSWC. Parshall and NDSWC, ***as well as any future local users, will be charged only for storage that exceeds the amount of water that would have been provided by the natural flow of the Missouri River had the Pick-Sloan reservoirs not been constructed.*** *(Emphasis added)*

In addition to the Corps' recognition of the natural flow concept in North Dakota, historically the Corps has also recognized natural flows and the need for flexibility within different regions of the United States. Specifically, the Corps' Engineering Manual EM 11102-3600, on page 2-18 states municipal and industrial water may be withdrawn from a reservoir under contractual arrangements that do not involve a commitment for the use of the reservoir storage, with the example of withdrawals from natural flow. Contractual arrangements in the form of easements should be used to address the pending easement applications that have water permits from the states.

In conclusion, the State of North Dakota has the right to allocate and manage both the natural flows of the Missouri River and the originally authorized water diversions from Missouri River reservoirs within our borders for the people of North Dakota. The state has these rights without storage contracts. The Corps is wrong in its current position. The Corps continues to cause harm to the basin states' citizens by denying their timely access to Missouri River natural flows and holding water users hostage to surplus storage fees and contracts. Thus, the current easement applications that have been submitted to the Corps need to be approved immediately.

The following attached comments include both general and specific comments concerning the Oahe Dam/Lake Oahe Surplus Water Report and a statement regarding the Environmental Assessment – with the following caveat.

These comments are offered in an effort to make the Surplus Water Report and Environmental Assessment grammatically and technically correct. These comments do not imply an endorsement of the reports by the State Engineer or the North Dakota State Water Commission. The State Engineer and the North Dakota State Water Commission consider the entire surplus storage initiative that claims natural flows to be stored water to be an illegal taking of state water rights by an agency of the federal government in violation of the Commerce Clause, and Tenth and Fourteenth Amendments of the United States Constitution.

And, finally, I ask that these comments and all referenced documents be included in the Administrative Record for each of the surplus water reports.

Sincerely,

Todd Sando

Todd Sando, PE
North Dakota State Engineer, and
Chief Engineer-Secretary to the North Dakota State Water Commission

Enclosures

CC: Governor Jack Dalrymple
Senator Kent Conrad
Senator John Hoeven
Congressman Rick Berg
Attorney General Wayne Stenehjem

TS:PF/1392

COMMENTS ON THE AUGUST 2012 US ARMY CORPS OF ENGINEERS OAHE DAM/LAKE OAHE DRAFT SURPLUS WATER REPORT AND ENVIRONMENTAL ASSESMENT

Oahe Dam/Lake Oahe Surplus Water Report Comments

Page i (Executive Summary, Third Paragraph)
Comment:
The Corps' recommendation for a comprehensive strategy to address long-term water needs prior to the end of the ten-year study period implies they have the right to do so. The Corps does not have this authority. Authority to allocate Missouri River water lies with the basin states.

Page i (Executive Summary, Fourth Paragraph)
"The temporary use of surplus water in Lake Oahe would result in additional net annual depletions of 5,211 acre-feet from the system for the ten year period, beyond existing usage levels. The primary difference between with and without project conditions is that under without project conditions, the additional 5,211 acre-feet will come from ground water sources and under with project conditions, withdrawal of the additional 5,211 acre-feet will come from the Oahe Dam/Lake Oahe Project."

Comment:
This implies that quality ground water is plentiful, and that restricting access to the Missouri River does not cause a major hardship on basin states and tribes, which is simply not true.

The prejudicial nature of the Corps' decisions in this entire process is that all downstream states and tribes below Gavins Point are in no way impeded from their access to natural flows, and exercising their authority to allocate water from the Missouri River for beneficial uses. While in contrast, North Dakota, South Dakota, and Montana have been prevented from accessing natural flows for over two and a half years. This creates an economic inequity, and places the reservoir states at a severe disadvantage.

Page 1-1 (Section 1.1, First Paragraph)
"...and to determine whether the use of surplus water is the most efficient method for meeting regional municipal and industrial (M&I) needs."

Comment:
There should be a notation that at some point in time use of surplus storage may be the only option to meet additional water supply needs. However, at this time there still are adequate natural flows that are not supplemented from storage that are able to address these M&I needs. If the Corps could follow their real estate policy that states, when storage contracts are needed, they need to be issued prior to granting easements, then the issue would be resolved. Following the policy, easements could be issued at the reservoirs without storage contracts, as storage contracts are not needed for senior appropriators. At

some point in time, junior appropriators could need storage contracts to provide for a more reliable water supply.

Reference to EM 1110-2-3600, page 2-18, should be added to this section. Again, it emphasizes that municipal and industrial water may be withdrawn from a reservoir under contractual arrangements that do not involve a commitment for the use of the reservoir storage, with the example of withdrawals from natural flow. The contractual arrangement in the form of an easement should be sufficient.

Page 1-2 (Section 1.2, Quote From Sec. 6, 1944 Flood Control Act)
"Provided, [t]hat no contracts for such water shall adversely affect then existing lawful uses of such water."

Comment:
There should be a notation added that through the actions of the Corps in not processing easements until unnecessary storage contracts are signed, the Corps is in effect requiring contracts that adversely affect and delay the access and lawful uses of water supply that can be granted through the state water appropriation process.

In order to not adversely impact existing lawful uses of water, the Corps' definition of storage cannot be redefined in this process to include natural flows.

Page 1-3 (Section 1.3, First Paragraph)
"Approval of this Report is a necessary pre-condition to executing surplus water agreements with, and issuing easements to, applicants for withdrawal of surplus water from the Corps Project."

Comment:
This is an incorrect statement. The Corps' run of the river scenario developed during the master manual process, and later illustrated graphically by the USGS (attached), shows that existing and even future municipal and industrial demands within the region have remained below the natural flow levels of the river within the boundaries of Lake Oahe. Water supply from storage has not been required to supplement these water supply needs. The statement appears to assume that existing senior appropriators are not within the natural flows of the river and would need storage contracts. This is not the situation. If there is additional evidence that supports this conclusion by the Corps, it must be provided in this report.

Page 2-4 (Section 2.2, First Paragraph)
Comment:
It should be added that Senate Document 247 directed development of Lake Oahe to follow the Bureau of Reclamation's plans outlined in Senate Document 191.

Senate Document 191, page 21, second to last paragraph, states:

"All these reservoirs will serve one fundamental purpose, namely, that of impounding water in periods of heavy run-off from the land, and releasing it during periods of low stream flow."

Further, page 22, third and fourth paragraphs, state:

"The capacities of the proposed reservoirs have been determined by two or more requirements – the impounding of flood waters as a means of reducing flood damages; the storing of water for the purpose of irrigating land, generating power, or supplying water for domestic, sanitary, or recreational and wildlife purposes; the storing of water to be released during the navigation season of the lower river; or the entrapping of silt. The releasing of water from upstream reservoirs will be governed generally by the requirements of irrigation and power generation, and from the lower reservoirs by navigation needs.

Of the water that falls as rain or snow, much is lost by evaporation from land and from the surfaces of lakes and streams, and even more is consumed by plant growth; the remainder runs away to the sea. The building of reservoirs and the irrigation of land will increase evaporation losses, but the water so lost will be stored floodwater, or will be replaced by stored floodwater. Water diverted from the Missouri River Basin for use in the northern and eastern parts of North Dakota, will also reduce the annual run-off of the Missouri River, but it, too, will be taken from floodwaters by means of the reservoirs. Despite these losses and diversions, sufficient run-off and flow will remain when regulated by the proposed reservoir to provide supplemental water from navigation on the lower river during normal low-water seasons."

The purpose was to increase beneficial use of water supply through the capture of heavy rainfall or snowmelt events. In effect, to provide a supplemental water source to the natural flow in low flow periods, and a capture and storage of heavy rain or snowmelt events to reduce flood damages. The purpose was not described as a way to limit or block states' beneficial use and appropriation of states' water resources that are within the natural flows - that have always been available without the storage of the reservoirs.

The Oahe Unit is described in detail starting on page 115 of the Senate Document 191. The description of how reservoirs were intending to support needs in combination are important to capture rather than taking apart each reservoir separately. On page 116 of the Senate Document 191 the following example is provided:

"Water stored in the Oahe Reservoir will be available for navigation purposes on the lower river, as a substitute for water taken from the Fort Peck Reservoir for irrigation and other purposes. Ample storage capacity for floodwaters will be provided, to reduce downstream flows to the safe capacity of the river channel from Sioux City to Kansas City. The reservoir will also have spare capacity to store the anticipated silt load of the river for an indefinite period

after upstream reservoirs are completed. In conjunction with additional reservoirs below Oahe, sufficient power can be produced to justify an installed capacity of 150,000 kilowatts at Oahe."

Page 2-5 (Section 2.3.2)
Comment:
The description should include the range of natural flows that occurred in this reach prior to the construction of the dam. The Corps' "Run of the River" model scenario that was developed as part of the master manual process may be able to be used to quantify and describe this natural flow. The "Run of the River" scenario is essentially a natural flow model, where the dams are not actively impounding water in this scenario.

Page 2-10 (Figure 2-3)
Comment:
The figure ignores the physical fact of flowing water within the reservoirs.

Page 2-11 (Third Paragraph)
Comment:
Why are conditions only described through March 2011? This paragraph does not appear to be updated with the information described in the following paragraph relating to 2011.

Page 2-12 (Section 2.5.1)
Comment:
This should include information regarding 2011.

Page 2-14 (Section 2.5.3, Third and Forth Paragraphs)
Comment:
Why is there a discussion of irrigation development from Garrison works and Lake Sakakawea included in the Oahe Dam/Lake Oahe Surplus Water Report?

Page 2-15 (First Full Paragraph)
"Although the Bureau's originally envisioned Federal mainstem irrigation projects have not developed as initially planned, numerous irrigators withdraw water directly from the reservoirs and downstream river reaches. Demand for this irrigation use is relatively small and minimum releases established for water quality control and other uses are usually ample to meet the needs of irrigators."

Comment:
Irrigation is a federally authorized purpose. But, irrigators applying for a state water permit need not necessarily fall under the Corps discretionary management for federally authorized purposes. According to Section 1 of the 1944 Flood Control Act and the O'Mahoney-Millikin Amendment of the 1944 Flood Control Act, private irrigation, authorized by the states to withdraw water from the Missouri River, including the reservoirs, whether in private or state supported development, have the right to use the water under state appropriation with primacy over federally authorized uses. This

recognition of upstream beneficial uses was an essential element in garnering support for the act.

Page 2-22 (Section 2.7.1)
"Execution of a Surplus Water Agreement may be required from any entity requesting water from the Oahe Dam/Lake Oahe Project."

Comment:
This should more accurately read: "Execution of a Surplus Water Agreement may be required from any entity requesting stored water from the Oahe Dam/Lake Oahe Project."

Page 2-22 (Section 2.7.2)
"All easements will contain an explicit reference to the surplus water agreement or water storage agreement and provide an explicit provision for termination of the easement for noncompliance with any of the terms and conditions of the surplus water agreement."

Comment:
This should more accurately read: "When water users have chosen to contract for a more reliable supply, future easements will contain an explicit reference to the surplus water agreement..."

Page 2-22 (Section 2.7.4)
Comment:
This paragraph should be reworked. Water withdrawals are not allocated by federal agencies. If the intent of this paragraph is to recognize allocation of storage by federal agencies, then it needs to be phrased that way.

Page 2-24 (Table 2-5 and Figure 2-4)
Comment:
There should be a distinction with power – what is consumptive and non-consumptive. Lumping the two together is an apples and oranges comparison.

Pages 3-27 - 3-64 (Section 3)
Comment:
This entire section should be rewritten in consideration of EM 1110-2-3600.

Pages 3-27 - 3-64 (Section 3)
Comment:
Language in the 1958 Water Supply Act limits the repayment period to a term that cannot exceed 50 years after the project is first used for the storage of water for water supply purposes. Stored water in these reservoirs has been used for navigation, power, and other water supply purposes for over 50 years. That 50-year timeframe for recovery of construction costs has expired.

Page 3-28 (Section 3.2, Quote From Sec. 6, 1944 Flood Control Act)

"Provided, that no contracts for such water shall adversely affect the existing lawful uses of such water..."

Comment:
There should be a notation added that through the actions of the Corps in not processing easements until unnecessary storage contracts are signed, the Corps is in effect requiring contracts that do adversely affect and delay the access and lawful uses of water supply that can be granted through the state water appropriation process.

Page 3-35 (Section 3.4.1 Second Paragraph)
"National water policy states that the primary responsibility for water supply rests with states and local entities, not the Federal government. However, the Corps can participate and cooperate with state and local entities in developing water supplies in connection with the construction, operation, or modification of Federal navigation, flood damage reduction, or multipurpose projects. Specifically, the Corps is authorized to provide storage in new or existing multipurpose reservoirs for municipal and industrial water supply. However, since water supply is a state and local responsibility, the cost of water supply storage and associated facilities in a Corps project must be paid for entirely by a non-Federal entity."

Comment:
Missouri River basin states are responsible for allocating the volume of natural flow in the Missouri River. This is not policy. It is our legal right.

The states at this point do not even need storage for M&I purposes. Furthermore, by imposing limits on water quantities available for withdrawal, and by undertaking the reallocation study and these surplus water reports, and asserting the position that all water behind the dams is stored water, the Corps is, de facto, taking control of allocating the water. Thus, for the Corps to suggest that states' rights to allocate water are being preserved is absurd. In the end, the Corps is not only saying that non-federal entities are responsible costs of storage that they neither need, nor asked for, but the Corps is also assuming the authority of who gets what. This entire concept is not only wrong, but more importantly, it is unlawful.

Furthermore, when the federal government is involved in allocations, the McCarren Act applies.

Page 3-35 (Section 3.4.1 Fourth Paragraph)
"Planning objectives for this study were developed to be consistent with Federal, State and local laws and policies, and technical, economic, environmental, regional, social, and institutional considerations."

Comment:
The Corps' planning objectives for this study are not consistent with state law. Prior to construction of the dams, the Missouri River in North Dakota was a free (natural) flowing river. Based on Article XVII, § 210 (1889) of the North Dakota Constitution, which was

ratified by the U.S. Congress, *"All flowing streams and natural watercourses shall forever remain the property of the state..."*

North Dakota Century Code Chapter 61-01 provides that waters of the Missouri River belong to the public and are subject to appropriation for beneficial use. The right to use this water must be acquired pursuant to North Dakota Century Code 61-04. Thus, requiring water users in North Dakota to pay "surplus storage fees" for waters of the state (natural flows) is not consistent with state laws.

Page 3-39
Comment:
The most important "Measure" that needs to be added in this section and was not is "Surface Water Withdrawals of Natural Flows Along Reservoir Reaches of the Missouri River."

As stated in previous letters to the Corps, in your attempt to charge for "surplus storage" in the reservoirs by requiring water storage contracts as a condition for easement to construct intake works, you are obstructing North Dakota's access to Missouri River natural flows. These waters belong to the people of North Dakota for their beneficial use, and their use of that resource should not be compromised because of the placement of a dam and reservoir that was not their decision.

The "Surface Water Withdrawals of Natural Flows Along Reservoir Reaches of the Missouri River" alternative would ultimately prove to be the most economically justifiable – at a cost of $0.00 per acre-foot. This is also in line with the "Requirements and Restrictions" cited on page 1-2 that state "The total annual price is to be limited to the annual costs of the least cost alternative, but never less than the benefits foregone (in the case of hydropower, revenues forgone)." As stated on page 3-54 (last sentence), "Because there is no net loss of NED benefits for the proposed action, the benefits foregone per acre-foot of storage would be $0.00. Whether the 5,211 acre-feet of additional depletions come from storage or natural flows, this should not change the benefits foregone.

Page 3-39 (Last Paragraph)
"Groundwater from newly constructed withdrawal wells is a viable alternative in most areas and is retained for further analysis."

Comment:
We cannot speak for conditions in South Dakota, but this is certainly not the case in North Dakota's Sioux County.

Page 3-42 (Section 3.6)
Comment:
The most likely future without project condition would be the withdrawal of Missouri River natural flows from reservoir reaches of the Missouri River, at a cost of $0.00 per acre-foot.

Page 3-44 (Table 3-6)
Comment:
The large amount of water use reported for power is misleading. Consumptive use for once-through power plants is very low – usually a few hundred to a few thousand acre-feet at most. Most of the water used for cooling in thermo-electric power generation is returned to the river and is available for use downstream. In five North Dakota power plants having once-through cooling, only 0.2% of the water is consumed.

Page 3-54 (Section 3.8.3)
Comment:
Once the "Surface Water Withdrawals of Natural Flows Along Reservoir Reaches of the Missouri River" are included in the Oahe Dam/Lake Oahe Surplus Water Report as a viable measure, the remainder of this section is largely unnecessary. However, if the Corps needs to include the subsequent related sections for comparison purposes, we would offer some suggested improvements/changes.

Pages 3-54 – 3-55
Comment:
The analysis of benefits and revenues foregone is required by law for the use of surplus water. However, this analysis it is not appropriate for state allocated uses not using stored water from Corps reservoirs. To apply such a cost/benefit analysis to state appropriated and non-federally funded works, and in deciding whether or not water can be used, the Corps is placing itself in the position of arbiter of economic development in the states.

Page 3-55 (Section 3.8.3.2, First Paragraph)
"Revenues from the sale of hydropower generated at the Oahe Dam are paid to the U.S. Treasury to recover the Federal investment in the power generating facilities (with interest) and other costs assigned to power for repayment, such as aid to irrigation development (Western Area Power Administration, Annual Report, 2009)."

Comment:
Please document the revenues received from power and what percentage of those revenues were put toward aid for irrigation.

Page 3-55 (Section 3.8.3.5)
Comment:
Fort Peck Dam/Fort Peck Lake should be replaced with Oahe Dam/Lake Oahe.

Page 3-56 (Continued From Previous Page)
Comment:
Fort Peck Dam/Fort Peck Lake should be replaced with Oahe Dam/Lake Oahe.

Pages 3-56 - 3-59
Comment:
The Corps' Water Supply Handbook states the cost of authorized M&I water supply storage in new and existing projects will be the total construction cost allocated to water supply storage space.

Section 9(c) of the Flood Control Act of 1944 provided specific language for allocation of costs and repayments by water users for the reservoirs on the Missouri River system. Due to the specific nature of Section 9 only applying to the Pick-Sloan reservoirs on the Missouri River system, Corps guidance manuals may be based on more general legislation. However the Corps' Allocation of Costs report from 1958, is specific to the reservoirs constructed under Section 9 of the 1944 Flood Control Act.

The 1958 Missouri River Main Stem Reservoir System Allocation of Costs report was officially adopted by the Chief of Engineers on December 22, 1958, and presented to Congress during hearings. Section 3-02 of the Allocation of Costs report states "The authorizing laws for the Main Stem Reservoirs referred to in paragraphs 2-01 thru 2-05 require that rates for power be such as to return the costs allocated to power with interest. In addition, the costs allocated to irrigation, are to be repaid without interest. The costs allocated to flood control and navigation are not required to be reimbursed."

Then as described in paragraph 9-02, the cost allocation report used the separable costs-remaining benefits method to determine costs. Further on page 54 it provides the allocation of construction costs for the authorized purposes as a percentage of total costs. Flood control is allocated 13.1% of the cost, Irrigation 12.1%, Navigation 8.6%, Power 65.9%, and Recreation 0.3%. The full 100% of construction costs are allocated to these purposes. There are no costs allocated to M&I water supply storage space.

In addition, Table 3 Summary of Annual Operation and Maintenance Costs, provides for the split for recovery of operation and maintenance costs. There are no operation and maintenance costs allocated to M&I water supply, and no joint use costs allocated to M&I water supply. As no costs were allocated to M&I water supply, in carrying out the guidance from the Corps' Water Supply Handbook, there can be no costs allocated to new M&I water supplies.

There is no authority for the Corps to change the original allocation of costs, planned for in Section 9 of the 1944 Flood Control Act. The McGovern Amendment states that these cost allocations cannot be reallocated without Congressional approval to change allocation of costs from the plan for ultimate development. After over 50 years of operation, there is no new requirement for charging municipal and industrial water use for either construction costs or operation and maintenance costs.

It is clear in the 1958 Allocation of Costs report that municipal and industrial water supply was a planned and authorized purpose. Paragraph 2-13 states

"The six Main Stem Reservoirs are to be operated as a coordinated interconnected system for the control of floods on the Missouri River from the mouth to Fort Peck Dam, and to lower flood crests on the Mississippi River; to meet the requirements for beneficial consumptive uses for irrigation and ***industrial and domestic water supply****; to assure maintenance of sufficient minimum releases for downstream pollution abatement; to provide adequate controlled releases for navigation on the Missouri River and connecting inland waterways, and for protection and formation of the navigation channel; for the maximum development of the power potential consistent with the foregoing uses; and to provide for the development of recreation, the conservation and enhancement of fish and wildlife, an other purposes."*

Pages 3-56 – 3-59
Comment:
With the Corps Real Estate Policy only enforcing water service contracts for those entities crossing reservoir lands, it is only forcing those nearest and most directly affected by the construction of the dams to repay the costs. Those receiving benefits downstream, including flood control and navigation, are incurring no costs under this policy. Those in the upper basin, who were forced to accept a permanent flood and have not received the full benefits of water supply originally planned, are charged for storage from which they receive no benefit, and for works that only impede access to their water. Additionally, the Corps is attempting to recover costs for power intake works, levees and floodwalls, and multiple reservoirs. However, these costs are not attributable to the water storage contracts the Corps is now requiring in North Dakota.

The Corps reports that they paid $70 million in relocations and $165 million for land and damage costs when the dam was constructed. They are now stating those closest to the reservoir, some whose family homes and farms were condemned, need to repay close to $2.3 billion to the federal government for these relocations and land costs just to access natural flows to which they are entitled under state appropriation laws. Further, there was no provision in the 1944 Flood Control Act requiring the indexing of costs of storage contracts from 1948 dollars to 2012 dollars. In doing so, the Corps has escalated the cost by 879 percent.

Page 3-61 (Table 3-17)
Comment:
This table should be modified to address previous comments – removing all costs associated with capital construction costs.

Page 3-61 (Section 3.8.3.8)
Comment:
The $6.48 per acre-foot should be $6.69 per acre-foot.

Page 3-62 (First Paragraph)
"The most likely, least costly water supply alternative to meet projected water supply needs in the absence of the Federal action is groundwater withdrawal."

Comment:
This is incorrect and should read "The most likely, least costly water supply alternative to meet projected water supply needs in the absence of the Federal action is surface water withdrawals of natural flows along reservoir reaches of the Missouri River."

The remainder of the paragraph should be modified to reflect that change.

Page 3-62, Table 3-19
Comment:
"Natural Flows From Within Lake Oahe Boundary" should be added to the table at a cost of $0.00 per acre-foot. The bottom line of the table should then be "Annual Savings from Using Natural Flows." The savings per acre-foot and total savings should be modified to reflect that change.

Oahe Dam/Lake Oahe Project Surplus Water Report EIS
Many of the issues and concerns outlined in the above comments for the Surplus Water Report are also directly applicable to the Environmental Assessment. Thus, we respectfully request that the Corps make considerations and adjustments accordingly within the EA based on our Surplus Water Report comments.

DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
WASHINGTON, DC 20310-0103

2 AUG 1985

Honorable Quentin Burdick
United States Senate
Washington, D. C. 20510

Dear Senator Burdick:

This is in response to your June 28, 1985, letter concerning proposed charges for water withdrawals from Lake Sakakawea.

As we have discussed, it is especially important in this time of national fiscal concern for the Department of the Army to conscientiously pursue recovery of past water project investments from project beneficiaries as required by law. However, as you explained during our meetings on this subject, it is not clear that withdrawals do benefit from the storage pool of Lake Sakakawea.

Because of this uncertainty, the Corps of Engineers has embarked on a study to determine yield thresholds for each of the main stem Missouri River reservoirs at which reliable water supplies would require storage. In addition, current and future demands are being identified for comparison to the yield thresholds. This information will enable us to determine which withdrawals, if any, benefit from the presence of the projects and will assist in identifying the impacts of withdrawals on other project purposes. This, in turn, will assist us in determining if any of the water users should be charged a fee.

Unfortunately, since the study described above involves complex issues and requires extensive coordination with State and local officials, we do not expect it to be completed prior to middle of 1987. Because some needs must be met much sooner than that date, we are actively seeking an interim solution within existing authorities that will allow withdrawals to begin immediately at no cost. We intend to keep in close contact with you as we develop this interim solution. We also plan to work very closely

(JD) F -

with you in developing a long term policy for water and storage sales from the main stem reservoirs after the results of longer term study are received in 1987.

I appreciate your continuing concern in this matter and feel confident that we will find a solution satisfactory to all parties.

Sincerely,

Robert K. Dawson
Acting Assistant Secretary of the Army
(Civil Works)

Senator Burdick,

I believe this will lead us to a fair solution.

T Bob

DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
WASHINGTON, DC 20310-0103

2 AUG 1985

Honorable Tom Daschle
House of Representatives
Washington, D. C. 20515

Dear Congressman Daschle:

This is in response to your recent letter concerning the proposal by the Corps of Engineers to begin charging the WEB Water Development Association in South Dakota a fee for the withdrawal of water from Lake Oahe.

It is Corps policy to charge when water is withdrawn or storage for water is reserved in one of its lakes. The Corps has two general authorities upon which to base this charge. One of these, Section 6 of the Flood Control Act of 1944, authorizes the Secretary of the Army to make contracts with non-Federal interests, at such prices and on such terms as the Secretary may deem reasonable, for domestic and industrial uses for surplus water that may be available at any reservoir under the control of the Secretary. The other general authority is the Water Supply Act of 1958. This Act authorized the Secretary of the Army, among other provisions, to reallocate reservoir storage for domestic and industrial uses at any reservoir under the control of the Secretary provided that the reallocation does not seriously affect the purposes for which the reservoir was authorized and non-Federal interests agree to pay for the cost of the storage allocated to water supply.

We feel that it is especially important in this time of national fiscal concern for the Department of the Army to conscientiously pursue recovery of past water project investments from project beneficiaries as required by law. However, as indicated in your letter, it is not clear that the WEB Project does benefit from the storage pool of Lake Oahe.

Because of this uncertainty, the Corps of Engineers has embarked on a study to determine yield thresholds for each of the main stem Missouri River reservoirs at which reliable water supplies would require storage. In addition, current and future demands are being identified for comparison to the yield thresholds. This information will enable us to

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determine which withdrawals, if any, benefit from the presence of the projects and will assist in identifying the impacts of withdrawals on other project purposes. This, in turn, will assist us in determining if any of the water users should be charged a fee.

Unfortunately, since the study described above involves complex issues and requires extensive coordination with State and local officials, we do not expect it to be completed prior to middle of 1987. Because the needs of the WEB Project must be met much sooner than that date, we are actively seeking an interim solution within existing authorities that will allow withdrawals to begin immediately at no cost. We intend to keep in contact with you as we develop this interim solution. We also plan to keep in contact with you as we develop a long term policy for water and storage sales from the main stem reservoirs after the results of longer term study are received in 1987.

I appreciate your continuing concern in this matter and feel confident that we will find a solution satisfactory to all parties.

Sincerely,

(Signed)

Robert K. Dawson
Acting Assistant Secretary of the Army
(Civil Works)

cf: SASG
DAEN-CW-SA (file)
DAEN-CWZ-X/CWP
SACW (read, signer)
Doc. #119, 61,5
ls, 7/31/85
C5062407

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House of Representatives
Washington, D.C. 20515

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June 13, 1985

Mr. Robert K. Dawson
Principal Deputy Assistant Secretary
Army Civil Works
2813 Central Avenue
Alexandria, VA 22302

Dear Mr. Dawson:

I am writing with regard to the Army Corps of Engineers proposal to begin charging the WEB Water Development Association in South Dakota a fee for the drawing of water from Lake Oahe.

It is my understanding that this proposal came from the District Office in Omaha. I would appreciate your advising me if this proposal is consistent with the National Office's interpretation of current law?

If it is determined that this is to be the policy of the Corps in the years to come, I would like to pose some additional questions to you.

1) Does the Corps have any plans to similarly begin charging a fee to navigational, flood control, or independent irrigation interests in downstream states who enjoy many of the benefits of the federal dams you are asking WEB and a selected few other projects to pay for?

2) Does the Corps also have plans to begin charging this fee to rural water systems who draw their water from federal resevoirs or is the policy limited to WEB?

3) Is the Corps of Engineers aware of the fact that the WEB project is not dependent, in whole or in part, on the existence of federal project facilities? If you accept this as fact, aren't you, in effect, charging the citizens of South Dakota for their own water?

4) Is the Corps of Engineers willing to conduct both public and private meetings in the impacted area to obtain input from municipal water users who will ultimately bear the brunt of this new policy? Would you also be willing to withdraw your proposal to WEB until such hearings are conducted?

As you can see, Mr. Dawson, there are many unanswered questions in my mind and in the minds of my constituents concerning this new policy of the Corps. I would very much appreciate it if you could advise me of the Corps' position on these critical issues at your earliest convenience.

With best wishes, I am,

Sincerely,

Tom Daschle
Member of Congress

DEPARTMENT OF THE ARMY
OFFICE OF THE GENERAL COUNSEL
WASHINGTON, DC 20310

REPLY TO ATTENTION OF
SAGC/Mr. Hoskins/pmd

13 March 1986

MEMORANDUM FOR THE ASSISTANT SECRETARY OF THE ARMY (CIVIL WORKS)

SUBJECT: Proposed Contracts for Municipal and Industrial Water Withdrawals from Main Stem Missouri Reservoirs

This responds to your memorandum of 25 October 1985, requesting my views on the adequacy of two water withdrawal contracts. The contracts grant the city of Parshall, North Dakota (Parshall) and the North Dakota State Water Commission (NDSWC) privileges to withdraw water from Lake Sakakawea for municipal and industrial purposes.

Lake Sakakawea was formed by the waters of the Missouri River stored behind the Garrison dam. The Garrison dam is one of six Missouri main stem dams authorized by section 9(a) of the Flood Control Act of 1944, P.L. 78-534, 58 Stat. 887. Pursuant to section 9(a), more commonly referred to as the Pick-Sloan Missouri River Basin Program, the six main stem dams are operated as a coordinated unit providing flood control protection, storage to enhance downstream navigation during prolonged droughts, hydropower storage, and storage of waters for irrigation.

The contracts provide that at a future date Parshall and NDSWC will agree to pay reasonable consideration based upon benefits received. It is my understanding that the consideration will amount to a charge for reservoir storage needed to fulfill the withdrawal demands of Parshall and NDSWC. Parshall and NDSWC, as well as any future local users, will be charged only for storage that exceeds the amount of water that would have been provided by the natural flow of the Missouri River had the Pick-Sloan reservoirs not been constructed.

In my opinion section 6 of the Flood Control Act of 1944, P.L. 78-534, 58 Stat. 887, codified at 33 U.S.C. § 708, authorizes your office to enter into the proposed contracts with Parshall and NDSWC. Section 6 provides that:

> 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.

At issue in the Parshall and NDSWC contracts is whether surplus water exists in Lake Sakakawea. Certain legal opinions from the Corps of Engineers suggest that water in the main stem reservoirs would not be available for municipal or industrial purposes so long as the water is otherwise being used, or could be used, for the purposes specifically identified in the Pick-Sloan program. Under this analysis there is no surplus water in Lake Sakakawea because all water not actually needed for irrigation or otherwise held within the reservoirs for navigation purposes, could eventually be discharged through the generators to produce hydroelectric power.

In my opinion, this interpretation of what constitutes surplus water is unnecessarily narrow. Under the authority of section 6 of the Flood Control Act, your office, acting for the Secretary of the Army, has broad discretion in marketing waters trapped in Corps of Engineers reservoirs. Congress made clear that section 6 of the Flood Control Act would give the Secretary of the Army authority equivalent to the authority of the Bureau of Reclamation pursuant to the Reclamation Projects Act of 1939, 43 U.S.C. § 485h(c).

During congressional debate over section 6 of the Flood Control Act of 1944, the House bill's sponsor explained the purpose of section 6 as follows:

> Section [6] provides that if there is a town or a city or a municipality that needs an additional water supply -- and water is just as essential for human beings as it is for crops -- the [Secretary of the Army] shall have the right to provide that that water shall be used there for the purpose of supplying the needs of man. It strikes me that the provision is a power that now obtains under the reclamation law. If it obtains under the reclamation law, I know of no good reason why it should not obtain in the existing bill.

90 Cong. Rec. 4125 (daily ed. May 8, 1944) (statement of Rep. Whittington). Later in the debate Congressman Whittington added the following:

> My recollection is that under the reclamation acts, and in the distribution of water under those acts, the Secretary of the Interior has the power to do in reclamation districts just what the [Secretary of the Army] would have power to do in reservoir districts. <u>This [section] is to make comparable the powers excerised by the Director of Reclamation and the [Secretary of the Army] and would apply only to waters that were surplus and not needed for irrigation or other purposes.</u>

<u>Id.</u> at 4134 (emphasis added).

Federal reclamation law grants the Secretary of the Interior broad discretion in marketing water stored in Bureau of Reclamation reservoirs and electric power produced at those reservoirs. Section 9(c) of the Reclamation Projects Act of 1939, P.L. 76-260, authorizes the Secretary of the Interior to enter into contracts for municipal water supply and the sale of electric power or lease of power privileges. 43 U.S.C.

§ 485h(c). This authority is limited by the requirement that "[n]o contract relating to municipal water supply or miscellaneous purposes or to electric power or power privileges shall be made unless, in the judgment of the Secretary, it will not impair the efficiency of the project for irrigation purposes." Id.

This provision has been interpreted to authorize the Secretary of the Interior to sell to municipal and industrial users water that was originally intended for use in irrigation but is not presently needed for that purpose. See Environmental Defense Fund v. Morton, 420 F. Supp. 1037)(D. Mont. 1976) reversed on other grounds Environmental Defense Fund v. Andrus, 596 F.2d 848 (9th Cir. 1979); see also State of Missouri v. Andrews, 586 F. Supp. 1268 (D. Neb. 1984); Review of Federal Marketing Practices, Decision of Comptroller General, Sep 25, 1981, B-198376, B-198377, B-198378-O.M. (unpublished); Clarification of Provisions of Water Supply Act of 1958 and the Reclamation Act of 1939, Decision of Comptroller General, Nov 14, 1979, B-157984 - O.M.

In my opinion section 6 of the Flood Control Act gives the Secretary of the Army similar authority to market water stored in the Pick-Sloan flood control reservoirs. The Reclamation Projects Act authorizes the Secretary of Interior to reallocate and market water not needed to fulfill the paramount reclamation purpose of irrigation. Section 6 of the Flood Control Act provides the Secretary of the Army similar authority with regard to water he determines is not needed to fulfill a project purpose in Army reservoirs.

Courts have been deferential to the Secretary of Interior's determinations that the sale of water for municipal water supply does not impair the project's irrigation purpose. Environmental Defense Fund v. Morton, 420 F. Supp. at 1045. The legislative history of section 6 of the Flood Control Act implies that the Secretary of the Army's determinations with respect to water stored in Corps reserviors are to be granted the same deference. In United States v. 361.91 Acres of Land, the district court held that:

> The function of carrying out the overall plan for the development of the Missouri

> River Basin has been delegated by Congress to the Department of [the Army] and Interior, and the Secretaries of those Departments have been vested with a wide discretion in carrying out such plan, and the courts have little or no authority to interfere with the exercise of that discretion.

Environmental Defense Fund v. Morton, 420 F. Supp. at 1043 quoting United States v. 361.91 Acres of Land, Civil No. 994 (D. Mont. 1965)

It is my understanding that none of the water stored in Lake Sakakawea is being withdrawn for irrigation purposes. Rather, discharges from Lake Sakakawea flow through the Garrison dam hydro-turbines to produce electricity. In my opinion the Secretary of the Army has the discretion to market water in Lake Sakakawea even if this results in a decrease of the project's actual or potential power production. Section 6 was included in the Flood Control Act to empower the Secretary of the Army to make reasonable reallocations between the different project purposes.

During congressional debate on Section 6, Congressman Whittington stated:

> It happens in many cases that there is a need, as the War Department has reported to the committee, for water for human consumption because of the drying up of wells. If that need occurs in Ohio, or if that need occurs in Massachusetts, or in any other State, instead of requiring the local people in the first instance where there is inability in many cases to issue bonds and to incur large indebtedness to share in the construction of that reservoir, the purpose of section [6] is to enable the Government, the Secretary of War, and the Chief of Engineers to make a disposition of water there for human consumption or for any proper industrial use .... I submit Mr. Chairman, that if it be proper to provide for the storing of waters for reclamation to grow crops in the arid West,

with which I am in sympathy, it ought to be all the more in order to provide for the storing of waters for human consumption.

90 Cong. Rec. 4107 (daily ed. May 9, 1944) (statement of Rep. Whittington).

This indicates an intention to put water needs for other human uses on a par with water needs for irrigation. That, in turn, would give the Secretary authority to balance such needs against the need for water for other purposes, such as hydropower, specifically identified in the Pick-Sloan program.

In the case of Lake Sakakawea the argument for making water available for these other human uses is even stronger. It was originally intended that water from the reservoir would be used for irrigation, but none is being used for that purpose. That "unused" water, at least, surely can be considered surplus water within the meaning of section 6. Thus, section 6 gives the Secretary of the Army discretion to determine whether this water should be used to provide municipal water supply, at least to the extent that his decision does not unreasonably impair the efficiency of the reservoir's other purposes. Cf. 43 U.S.C. § 485h(c).

Although arguably not required by section 6 of the 1944 Flood Control Act, I suggest that the Department of the Army and the Department of Interior enter into a memorandum of understanding outlining plans for present and future irrigation use of the Lake Sakakawea waters. This would facilitate a determination as to how much surplus water will be available for marketing. Documentation of the availability is desirable both for planning purposes and to ensure that the Army is not exceeding its section 6 authority.

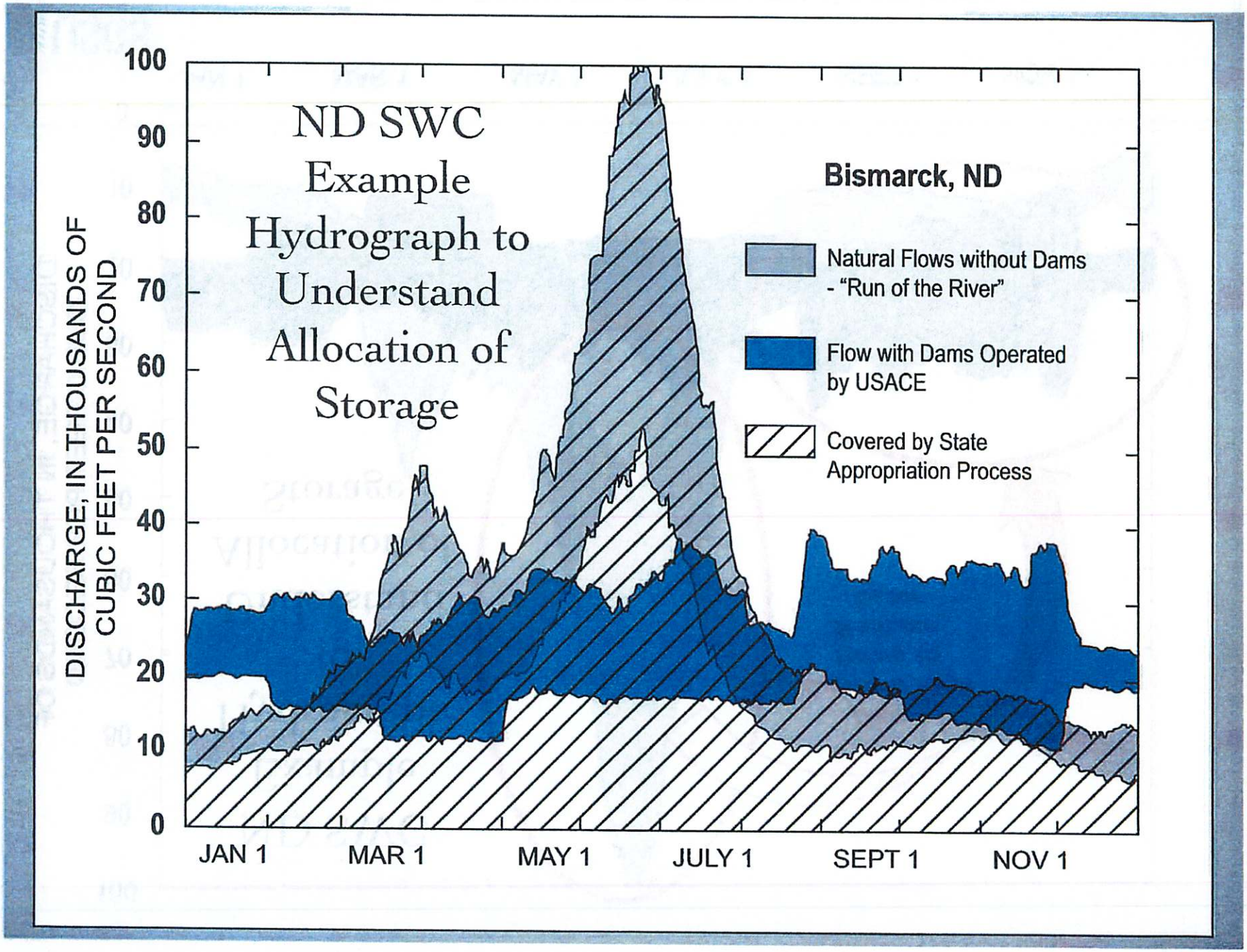
Additionally, I suggest that the contracts be amended to incorporate the comments of Major General Hatch at paragraph 2d of his 16 October 1985 memorandum. Specifically, in order to make the draft contracts consistent with the form contract in ER 1105-2-20 Appendix B, the second WHEREAS clause should be modified to state that the contract is entered into under the authority of the 1944 Flood Control Act. Also, in the interest of minimizing any future dis-

putes, Article 5 should explain the intended compensation formula. Similarly, Articles 5 and 6 should explain that the water charge will not change over time except to reflect updated operation, maintenance, and replacement costs.

If we may be of any additional assistance in this matter, please do not hesitate to call.

Susan J. Crawford

Susan J. Crawford
General Counsel


ND SWC
Example
Hydrograph to
Understand
Allocation of
Storage
Bismarck, ND
Natural Flows without Dams
- "Run of the River"
Flow with Dams Operated
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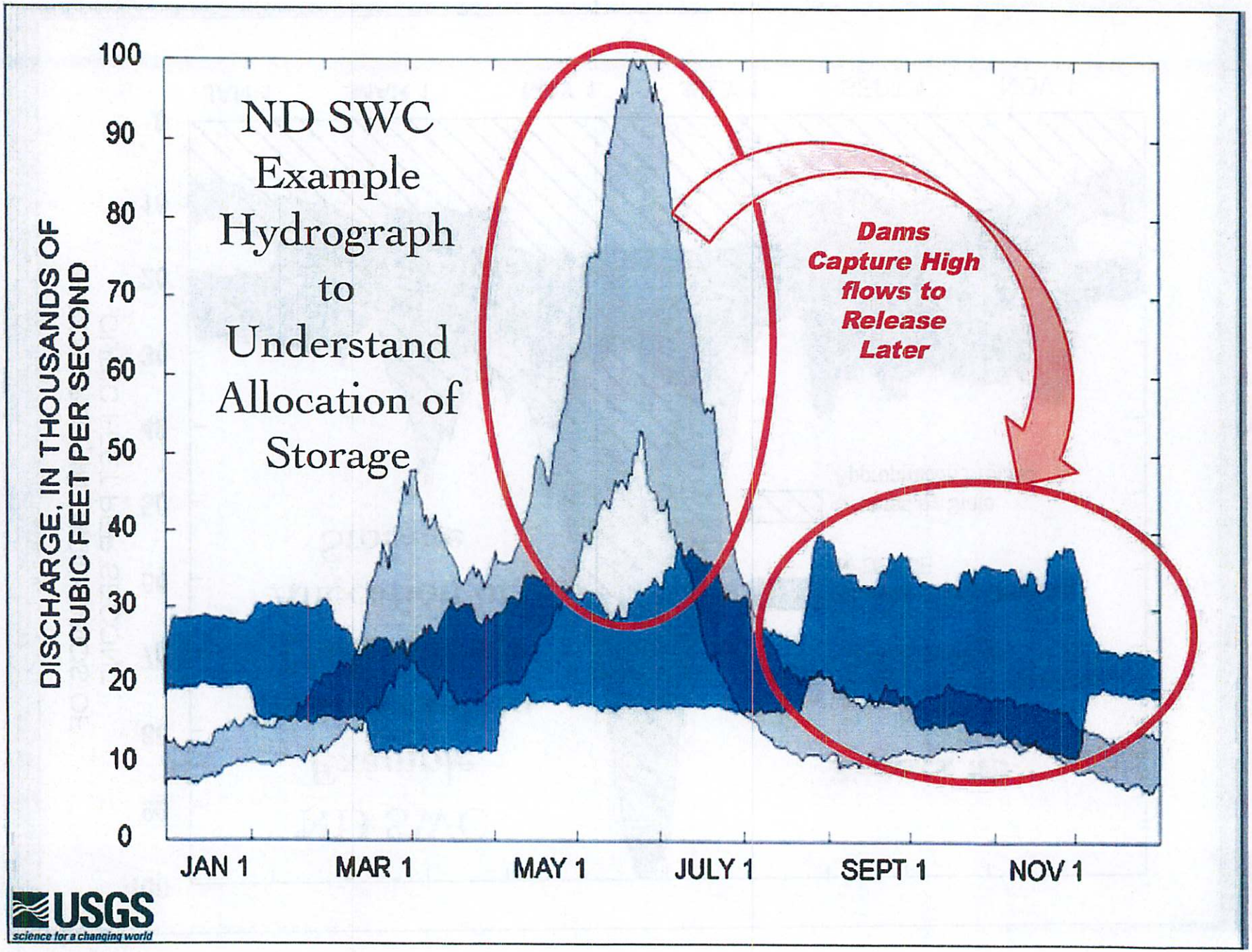
ND SWC
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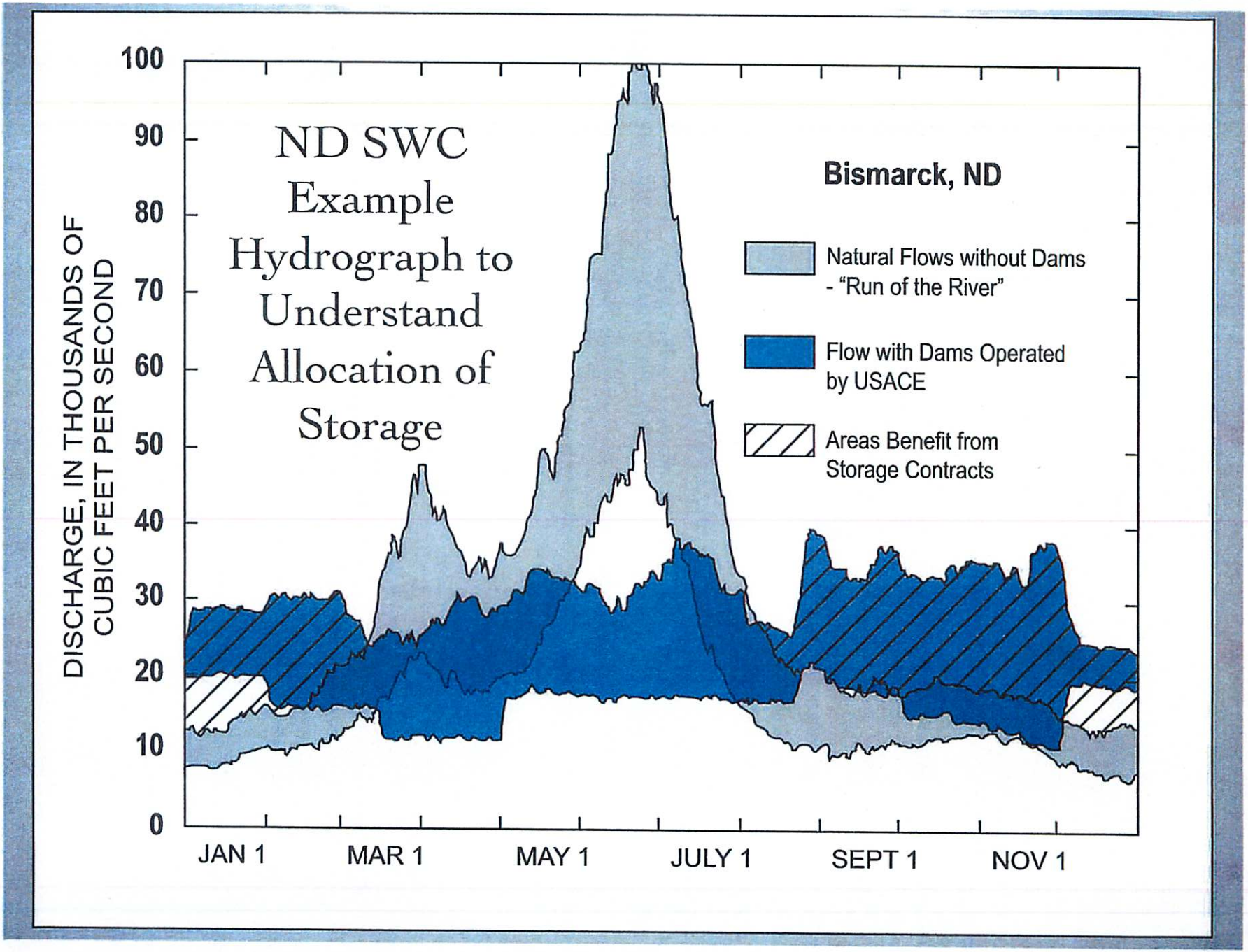
science for a changing world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