



# Federal and State Authority over Surplus Water Stored at Federal Water Projects

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November 27, 2012

Congressional Research Service

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[www.crs.gov](http://www.crs.gov)

R42836

## Summary

Various water supply shortages and greater demand for water supply related to energy development projects have brought increased attention to disputes over the control of water resources across the country. In particular, domestic on-shore unconventional oil and gas development, such as hydraulic fracturing, has caused rapid growth in freshwater demand. To accommodate water supply requests in the Missouri River Basin, the U.S. Army Corps of Engineers (Corps) has proposed the use of surplus water from its Garrison Dam/Lake Sakakawea Project in North Dakota. The Corps' proposal would allow it to enter into five-year contracts to supply surplus water for a fee, which will be set through administrative rulemaking. North Dakota and other states have objected to the Corps' proposal as a violation of their constitutional right to water flowing within their borders, arguing that the Corps cannot require payment for water that the state owns.

Although the legality of the Corps' charging for surplus water storage at its facilities has not been litigated specifically, the Corps' constitutional authority over operations at its reservoirs is generally very broad. Additionally, Congress has authorized the Corps to charge for surplus storage at federal projects such as the Garrison Dam/Lake Sakakawea Project. Of course, statutory approval of an action that may interfere with state sovereignty does not connote constitutionality. Other provisions within the Corps' statutory authorities arguably may indicate that Congress did not intend to infringe upon state sovereignty over water rights within its boundaries. While it appears that the Corps has broad authority to impound waters owned by the state for the *purposes* of a particular project without necessarily acquiring water rights under state law, it may be argued that *surplus* water, which is not used for any of the authorized purposes, is beyond the control of the Corps. However, the viability of such an argument is unclear, given the lack of legal precedent on the issue.

This report addresses the legal authority of the Corps to charge for surplus water stored at its facilities. It analyzes the constitutional and statutory authority of the federal government to operate federal water projects, specifically Lake Sakakawea, along the Missouri River. It also examines the nature of states' claims of ownership of waters within state boundaries. Finally, the report discusses the relationship between federal and state authority, including examples in which Congress addressed competing federal and state roles.

## **Contents**

Introduction.....	1
Water Storage at Lake Sakakawea .....	2
Authorization of Garrison Dam.....	2
Corps Contracts for Water Withdrawals for Surplus Stored Water.....	3
Constitutional Authority for Water Storage at Federal Water Projects .....	4
Statutory Authority Related to Water Storage at Corps' Projects .....	5
The Water Supply Act of 1958 .....	5
Section 6 of the Flood Control Act of 1944.....	6
State Ownership of Water Within Its Boundaries .....	6
Congressional Treatment of States' Water Rights at Federal Water Projects.....	7
Requiring Federal Agencies to Conform to State Water Law.....	8
Federal Statutory Deference to State Water Rights at Federal Projects.....	8
Conclusion .....	9

## **Contacts**

Author Contact Information.....	10
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## Introduction

Various water supply shortages and greater demand for water supply related to energy development projects have brought increased attention to disputes over the control of water resources across the country. For example, new applications of energy extraction technologies have increased oil and gas production from shale formations in various regions of the United States.<sup>1</sup> One method of extraction, known as hydraulic fracturing, typically injects a pressurized freshwater-based liquid mixture into wells to fracture shale formations containing the oil or gas.<sup>2</sup> In particular, the demand for water supply to develop energy in the northern plains states has raised controversy over water use in the Missouri River basin.<sup>3</sup>

Access to water for energy development purposes has created tension between federal and state interests when stakeholders seek access to freshwater from federal water projects. This issue has been of particular interest at Lake Sakakawea, a reservoir created by the federal Garrison Dam along the Missouri River in North Dakota. In recent years, the U.S. Army Corps of Engineers (Corps), which controls Lake Sakakawea and five other mainstem Missouri River reservoirs, has identified surplus water in these reservoirs and considered how it would contract with industrial and municipal users interested in the temporary use of this water. In 2012, the Corps announced plans to provide access to surplus water at Lake Sakakawea for municipal and industrial (M&I) use under surplus water agreements and ultimately to charge a fee for access to water stored at the project.<sup>4</sup> State interests have opposed the Corps' plan, arguing that the Corps should not charge for access to water that would be available for state allocation if the river were flowing freely.<sup>5</sup> According to this argument, the Corps' plan infringes on state authority to administer water rights.

Although the federal government has fairly broad authority related to water resources management, water allocation has traditionally been a matter left to the states, which administer their own water rights systems. This dual exercise of authority over water resources has led to questions over the Corps' proposed actions at its Missouri River reservoirs. Using Lake Sakakawea as an example, this report analyzes the legal authority of the Corps to charge for stored surplus water. It examines the relevant constitutional and statutory authority of the Corps to operate federal water projects, including the Water Supply Act of 1958<sup>6</sup> (WSA) and the Flood Control Act of 1944<sup>7</sup> (1944 FCA). It also analyzes state authority over water within state boundaries and discusses the relationship between federal and state authority, including examples

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<sup>1</sup> See CRS Report R42333, *Marcellus Shale Gas: Development Potential and Water Management Issues and Laws*.

<sup>2</sup> It has been estimated that the potential amount of water consumption in Marcellus Shale development could be 30 million gallons per day. U.S. Congress, Senate Committee on Energy and Natural Resources, Subcommittee on Water and Power, *Shale Gas Production and Water Resources in the Eastern United States*, 112<sup>th</sup> Cong., 1<sup>st</sup> sess., October 20, 2011 (statement of Thomas W. Beauduy, Deputy Executive Director & Counsel, Susquehanna River Basin Commission).

<sup>3</sup> See CRS Report R42032, *The Bakken Formation: Leading Unconventional Oil Development*.

<sup>4</sup> *Final Garrison Dam/Lake Sakakawea Project North Dakota Surplus Water Report*, U.S. Army Corps of Engineers, Omaha District (March 2011, made public July 19, 2012) (hereinafter *Lake Sakakawea Final Surplus Water Report*).

<sup>5</sup> See, e.g., News Release, Attorney General Marty Jackley Questions Corps of Engineers' Decision to Charge South Dakota for Its Own Water, Attorney General's Office (Aug. 20, 2012), available at <http://atg.sd.gov/News/NewsReleases/NewsReleasesView/tabid/441/itemID/2956/moduleID/719/view/597/Default.aspx>.

<sup>6</sup> 43 U.S.C. §390b.

<sup>7</sup> Act of December 22, 1944, 58 Stat. 887.

of congressional actions that have addressed competing federal and state roles regarding water resources.

## **Water Storage at Lake Sakakawea**

Federal water projects may be operated for a variety of authorized purposes, typically identified by Congress at the time of the project authorization. Project purposes may include navigation, flood control, hydropower, M&I use, irrigation, etc. The federal agency authorized to operate the project may do so for any purpose identified by the project legislation, or for any purpose otherwise generally authorized by law.<sup>8</sup>

### **Authorization of Garrison Dam**

Congress authorized the Corps to construct various federal water projects along the Missouri River, including the Garrison Dam/Lake Sakakawea Project in North Dakota, in the Flood Control Act of 1944.<sup>9</sup> The Corps has operated Lake Sakakawea for its authorized purposes of flood control, navigation, irrigation, hydropower, M&I water supply, fish and wildlife, water quality, and recreation.<sup>10</sup>

The federal government has considered the impact of development of water resources in the region on a number of occasions. The original construction of the Garrison Dam resulted in the creation of Lake Sakakawea, which submerged a portion of the state's farmland and tribal lands.<sup>11</sup> To compensate North Dakota for the loss of that land, Congress authorized the Garrison Diversion Unit, a project to provide irrigation, as well as M&I water supplies, to North Dakota.<sup>12</sup> In 1986, following the report of a commission directed to review water needs in North Dakota and propose modifications to the Garrison Diversion Unit, Congress approved the commission's recommendations to scale back irrigation development and improve availability of water from the Missouri River for municipal, industrial, and rural supplies.<sup>13</sup> The controversies associated with development of water diversion and distribution facilities ultimately were addressed in 2000,

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<sup>8</sup> See *In re Tri-State Water Rights Litigation*, 644 F.3d 1160 (11<sup>th</sup> Cir. 2011). The reallocation of water supply at federal projects has been the subject of decades-long litigation in the Apalachicola-Chattahoochee-Flint River Basin (ACF), and courts have relied on both project-specific authority to identify the project's authorized purposes and general authority to identify supplemental authority for additional purposes. See *id.*; *Southeastern Federal Power Customers v. Geren*, 514 F.3d 1316 (D.C. Cir. 2008).

<sup>9</sup> See Act of December 22, 1944, §9, 58 Stat. 887. Congress directed the Corps to provide the Secretary of the Interior an opportunity to cooperate in the plans and proposals of projects involving "the use or control of waters arising west of the ninety-seventh meridian," which would generally include the Reclamation states (North Dakota, South Dakota, Nebraska, Kansas, Oklahoma, Texas, and all other continental states west). *Id.* at §1(a). The Bureau of Reclamation within the Department of the Interior is the federal agency charged with managing water resources in the western states.

<sup>10</sup> *Lake Sakakawea Final Surplus Water Report* at 2-3.

<sup>11</sup> See Act of July 16, 1984, P.L. 98-360, §207, 98 Stat. 411-412.

<sup>12</sup> See Act of August 5, 1965, P.L. 89-108, §1, 79 Stat. 433. Congress authorized the Department of Interior, through the Bureau of Reclamation, to operate the Garrison Diversion Unit. See also P.L. 106-554 App. D, §607, 114 Stat. 2763A-286.

<sup>13</sup> See Act of May 12, 1986, P.L. 99-294, 100 Stat. 418.

when Congress approved legislation providing additional funding for various M&I water projects.<sup>14</sup>

## **Corps Contracts for Water Withdrawals for Surplus Stored Water**

In response to current and future M&I needs, the Corps has issued a Final Surplus Water Report for Garrison Dam/Lake Sakakawea and has published draft reports for each of the other five mainstem reservoirs on the Missouri River.<sup>15</sup> Noting its authority over projects on the mainstem of the Missouri River and over tributary projects with a dominant purpose of flood control, the Corps sought to determine whether and how much surplus water could be made available at Lake Sakakawea to meet M&I needs.<sup>16</sup>

The Corps has defined surplus water to include water stored in a Corps reservoir “that is not required because the authorized use for the water never developed or the need was reduced by changes that occurred since authorization or construction” or “water that would be more beneficially used as a municipal and industrial water than for the authorized purpose and which, when withdrawn, would not significantly affect authorized purposes over some specified time period.”<sup>17</sup> Courts have reiterated this definition, explaining that surplus water is a term that refers to “all water that can be made available from the reservoir without adversely affecting other lawful uses of the water.”<sup>18</sup> In other words, the lake contains a certain amount of water that is reserved for various authorized purposes. Any additional amounts of water held in the lake may be considered surplus, and the Corps may have authority to reallocate that water permanently or temporarily.<sup>19</sup>

Noting the rapid growth of demand for water from Lake Sakakawea, the Corps has concluded that “100,000 acre-feet of water can be identified as temporary surplus water, the use of which over the next 10 years would not significantly affect project purposes.”<sup>20</sup> However, the Corps has clarified that surplus water provided under the agreements may be used for M&I purposes but cannot be used for crop irrigation.<sup>21</sup> The Corps has explained that its surplus water agreements would not affect existing uses of water because a condition of the agreements requires acquisition of the legal water rights, which the state cannot issue if they affect pre-existing legal rights, as discussed below.<sup>22</sup>

Under the Corps’ proposal, interested parties would enter surplus water agreements with the agency, essentially contracting with the Corps for surplus water stored in Lake Sakakawea. The Corps would enter surplus water agreements with applicants for additional water supply for a

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<sup>14</sup> See P.L. 106-554 App. D, §607, 114 Stat. 2763A-286.

<sup>15</sup> Copies of the Corps’ various reports for each reservoir are available in its digital library, which may be accessed through its website, <http://www.nwo.usace.army.mil/Missions/CivilWorks/Planning.aspx>.

<sup>16</sup> *Lake Sakakawea Final Surplus Water Report*.

<sup>17</sup> *Id.* at 1-2 (citing Corps regulation ER 1105-2-100, paragraph E-57b(2)).

<sup>18</sup> *ETSI Pipeline v. Missouri*, 484 U.S. 495, 506 (1988).

<sup>19</sup> The Corps’ authority for permanent reallocation of stored water for M&I purposes falls under the WSA, while temporary reallocation through contracts is authorized by the 1944 FCA.

<sup>20</sup> *Lake Sakakawea Final Surplus Water Report* at 3-2 – 3-3.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 3-3.

term of five years, which would be renewable for an additional five-year term.<sup>23</sup> The Corps surplus storage agreements provide access to project storage, but the Corps does not have authority to allocate water to water users.<sup>24</sup> Thus, to use the water that is being stored, entities seeking to enter surplus storage agreements must secure water rights from the state under its water permit system.

The Corps has announced that the pricing policy for the storage agreements will be developed through a formal rulemaking process, which will allow for public comment before any final regulations are implemented.<sup>25</sup> The Corps expects the rulemaking process to last approximately 18 months.<sup>26</sup> Until that time, new and existing users will not be charged for water withdrawn from Lake Sakakawea pursuant to surplus water contracts.<sup>27</sup>

## **Constitutional Authority for Water Storage at Federal Water Projects**

The Corps has broad constitutional authority for its water projects. The Supreme Court historically has held that the Corps' authority derives from the Commerce Clause and the significant interest in promoting navigation throughout the nation's waterways.<sup>28</sup> The breadth of this authority regarding various purposes of Corps' operations has been recognized repeatedly.

In 1899, the Court explained that the states' control of the appropriation of their waters was subject to "the superior power of the General Government to secure the uninterrupted navigability of the all navigable streams within the limits of the United States."<sup>29</sup> Citing this principle, the Court later held that a state could not enjoin the Corps from constructing a dam and reservoir, even if the water impounded within the reservoir was controlled by the state.<sup>30</sup> The Court rejected the state's argument that the project would interfere "with the state's own program for water development and conservation ... [which] must bow before the 'superior power' of Congress."<sup>31</sup>

The Court has indicated that the constitutional "authority is as broad as the needs of commerce."<sup>32</sup> It has explained that maintaining the navigability of waterways is only one of the various purposes for which the government may claim authority over water.<sup>33</sup> The Court has stated that if

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<sup>23</sup> *Id.* at 1-1.

<sup>24</sup> *Id.* at 2-14 – 2-15.

<sup>25</sup> News Release, *Final Garrison Dam/Lake Sakakawea Surplus Water Report, Environmental Assessment Available to Public*, U.S. Army Corps of Engineers (July 19, 2012), available at <http://www.nwo.usace.army.mil/Media/NewsReleases/tabid/1835/Article/3075/final-garrison-damlake-sakakawea-surplus-water-report-environmental-assessment.aspx>. See also CRS Report R41546, *A Brief Overview of Rulemaking and Judicial Review*.

<sup>26</sup> *Id.*

<sup>27</sup> *Lake Sakakawea Final Surplus Water Report*, Addendum No. 1 at 1-2 (July 10, 2012).

<sup>28</sup> See *Gibbons v. Ogden*, 22 U.S. 1 (1824).

<sup>29</sup> *United States v. Rio Grande Dam and Irrigation Co.*, 174 U.S. 690, 703 (1899).

<sup>30</sup> *Oklahoma v. Atkinson*, 313 U.S. 508 (1941) ("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.").

<sup>31</sup> *Id.* at 534-35.

<sup>32</sup> *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 426 (1940).

<sup>33</sup> *Id.*

a particular project serves a purpose of navigation, “it is constitutionally irrelevant that other purposes may also be advanced.”<sup>34</sup> It has cited other valid purposes such as flood control, watershed development, and “recovery of the cost of improvements through utilization of power” as examples of the breadth of federal authority over waters.<sup>35</sup>

Thus, a state’s authority over its waters is “subject to the power of Congress to control the waters for the purpose of commerce.”<sup>36</sup> Accordingly, if Congress authorizes the Corps to impound water at one of its projects for purposes related to commerce, the federal authority over the water supersedes the state’s authority for those purposes. Notwithstanding this broad authority, Congress historically has deferred to states’ authority regarding allocation, as discussed in later sections of this report.

## **Statutory Authority Related to Water Storage at Corps’ Projects**

In addition to the Corps’ general constitutional authority, Congress has provided statutory authority for specific actions by the Corps related to M&I water supplied at its projects. Under the WSA, the Corps may include permanent storage space at its projects for municipal and industrial use, even if such a purpose was not originally authorized.<sup>37</sup> Under the 1944 FCA, the Corps may contract with other government or private parties for the temporary use of surplus water from its projects.<sup>38</sup>

### **The Water Supply Act of 1958**

In 1958, Congress recognized state primacy in developing M&I supplies, stating,

It is hereby declared to be the policy of the Congress to recognize the primary responsibilities of the States and local interests in developing water supplies for domestic, municipal, industrial, and other purposes 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 navigation, flood control, irrigation, or multiple purpose projects.<sup>39</sup>

To promote this policy, the WSA authorizes the Corps to include water storage for M&I use as a project purpose for new and existing projects: “[S]torage may be included in any reservoir project surveyed, planned, constructed or to be planned, surveyed and/or constructed by the Corps of Engineers ... to impound water for present or anticipated future demand or need for municipal or industrial water....”<sup>40</sup>

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<sup>34</sup> *United States v. Twin City Power Co.*, 350 U.S. 222, 224 (1955).

<sup>35</sup> *United States v. Appalachian Electric Power Co.*, 311 U.S. at 426.

<sup>36</sup> *Id.* at 423.

<sup>37</sup> 43 U.S.C. §390b.

<sup>38</sup> 33 U.S.C. §708.

<sup>39</sup> 43 U.S.C. §390b(a).

<sup>40</sup> 43 U.S.C. §390b(b).



The WSA includes a few limitations on the Corps' ability to add M&I storage as a purpose for its projects.<sup>41</sup> Congress indicated that construction and modification costs would be shared by state and local interests and that such costs would be “determined on the basis that all authorized purposes served by the project shall share equitably in the benefits of multiple purpose construction.”<sup>42</sup>

Notably, the WSA states that it does not modify Section 1 of the 1944 FCA.<sup>43</sup> Section 1 of the 1944 FCA recognizes “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>44</sup> As discussed in more detail below, this provision perhaps may indicate that the WSA was not intended to supersede state water rights.

## **Section 6 of the Flood Control Act of 1944**

Section 6 of the 1944 FCA specifically authorizes the Corps to enter contracts for surplus water. The Corps “is authorized to make contracts with States, municipalities, private concerns, or individuals, at such prices and on such terms as [it] may deem reasonable, for domestic and industrial uses for surplus water that may be available at any reservoir under the control of the [Corps].”<sup>45</sup>

The contracts entered under Section 6 must not “adversely affect then existing lawful uses of such water.”<sup>46</sup> The Corps cited its authority under Section 6 in its pursuit of surplus water agreements at Lake Sakakawea. As discussed above, the Corps has stated that the proposed agreements would not affect existing lawful uses of water at the project.<sup>47</sup>

It does not appear that the Corps' authority under Section 6 has been litigated with respect to potential interference with state ownership of water. In other challenges arising under Section 6, courts have recognized the authority conferred by Section 6 as valid when applied to the Corps.<sup>48</sup>

## **State Ownership of Water Within Its Boundaries**

States in the Missouri River basin have objected to the Corps' plan to charge a fee for surplus water stored at its reservoirs. States have argued that maintaining surplus water supply in the federal reservoir and charging citizens for the right to access that water which otherwise would be available through natural flow of the river violates their legal right to state waters.<sup>49</sup> North

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<sup>41</sup> Modifications authorized by the WSA that “seriously affect” original purposes or “involve major structural or operational changes” must be approved by Congress. 43 U.S.C. §390b(d). *See also* CRS Report R42805, *Reallocation of Water Storage at Federal Water Projects for Municipal and Industrial Water Supply*.

<sup>42</sup> 43 U.S.C. §390b(b).

<sup>43</sup> 43 U.S.C. §390b(c).

<sup>44</sup> 33 U.S.C. §701-1.

<sup>45</sup> 33 U.S.C. §708.

<sup>46</sup> *Id.*

<sup>47</sup> *Lake Sakakawea Final Surplus Water Report* at 2-14 – 2-15.

<sup>48</sup> *ETSI Pipeline*, 484 U.S. 495 (holding that Secretary of Interior may not contract to provide surplus water).

<sup>49</sup> *See, e.g.*, News Release, Attorney General Marty Jackley Questions Corps of Engineers' Decision to Charge South (continued...)

Dakota, in which Lake Sakakawea is located, has asserted ownership of the waters flowing within the state boundaries, claiming that charging for access to that water while it is stored in a Corps' project violates that legal right.<sup>50</sup>

The U.S. Supreme Court has long held that a state owns the navigable waters within its borders.<sup>51</sup> In 1842, the Court explained that when the United States was formed, “the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government.”<sup>52</sup>

Under the constitutional equal footing doctrine, states that later joined the union acquired the same rights granted to the original states, and therefore also acquired ownership of their state's navigable waters upon achieving statehood.<sup>53</sup> Thus, the Missouri River basin states may claim the right to waters within their state boundaries since their admission to the union.

It is notable that, although the Court recognized state ownership of water within state boundaries, it also indicated that the state's interest in its waters could be limited by superseding rights assigned under the Constitution to the federal government.<sup>54</sup> In other words, the state may not claim absolute ownership to navigable waters if the federal government has constitutional authority to act with respect to those waters.

## **Congressional Treatment of States' Water Rights at Federal Water Projects**

Although the federal government has broad authority to regulate water, it historically has deferred to the states' authority regarding allocation of water resources within each state. In some cases, it explicitly has recognized the states' power to assign water rights, though it has done so on a limited basis. At other times, Congress has noted the competing roles of federal and state governments with respect to water resources management and included general statements recognizing the interests of a state related to specific legislation.

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Dakota for Its Own Water, Attorney General's Office (August 20, 2012), available at <http://atg.sd.gov/News/NewsReleases/NewsReleasesView/tabid/441/itemID/2956/moduleID/719/view/597/Default.aspx>.

<sup>50</sup> Letter from Todd Sando, State Engineer, Secretary of the State Water Commission, to Colonel Robert Ruch, U.S. Army Corps of Engineers (February 11, 2011), available at <http://mo-rast.org/wp-content/uploads/2011/06/SWR-ND-SWC-2-1-11.pdf>. North Dakota has asserted its federal constitutional rights, as well as its state constitutional rights to the water. See N.D. Const. art. XI, §3 (“All flowing streams and natural watercourses shall forever remain the property of the state”); U.S. Const., amend. X.

<sup>51</sup> *Martin v. Lessee of Waddell*, 41 U.S. 367 (1842); *Pollard v. Hagan*, 44 U.S. 212 (1845). See also *PPL Montana v. Montana*, 132 S.Ct. 1215 (2012).

<sup>52</sup> *Martin*, 41 U.S. at 410.

<sup>53</sup> *Pollard*, 44 U.S. at 228-29. See also U.S. Const. art. IV, §3, cl. 1.

<sup>54</sup> *Martin*, 41 U.S. at 410.

## **Requiring Federal Agencies to Conform to State Water Law**

In some instances, Congress has recognized the authority of states to allocate water and consequently required federal compliance with state water rights schemes. For example, Section 8 of the Reclamation Act of 1902 requires the Bureau of Reclamation (Reclamation) to conform with state water laws “relating to the control, appropriation, use, or distribution of water...”<sup>55</sup> The Supreme Court has explained that Section 8 “requires the Secretary to *comply* with state law in the ‘control, appropriation, use or distribution of water’” by a federal project, confirming that Reclamation must acquire water rights for water it impounds at its water projects in various states (as had been the agency’s practice).<sup>56</sup> Reclamation then contracts with water users to provide water. Reclamation generally holds the water right, which is allocated by the state’s water authority, and the water users hold a contract right to the water provided under their agreement with Reclamation.<sup>57</sup>

It does not appear that the Corps is subject to any such similar provision requiring conformity with state water law. Arguably, this may be a result of the different nature of Corps projects in comparison to projects operated by Reclamation. While Reclamation projects are authorized largely for irrigation and some M&I uses, Corps projects generally operate for nonconsumptive uses, meaning that water used at the project is replenished locally, not diverted away from its source for offstream uses. Additionally, many Reclamation projects are classified as single-purpose projects, but most Corps projects are multi-purpose, with flood control and navigation being the primary purposes. Finally, Reclamation projects are authorized for development in the western states, which on the whole are more arid than the rest of the country in which the Corps also operates.

Congress, of course, may consider whether the Corps or other agencies besides Reclamation should be required to comply with state water laws. If the Corps was obligated to obtain water rights to the water stored in Lake Sakakawea, it may avoid the controversial claims that it was restricting access to water that would otherwise be available for acquisition through the state permit process.

## **Federal Statutory Deference to State Water Rights at Federal Projects**

Despite not requiring Corps’ conformity with state water laws, Congress has not ignored the impact that federal legislation may have on state water rights. The Corps’ statutory authorities

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<sup>55</sup> See 43 U.S.C. §383. Section 8 states that

[n]othing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof.

*Id.*

<sup>56</sup> See *California v. United States*, 438 U.S. 645, 674-75 (1978) (emphasis added).

<sup>57</sup> In some cases, water users may have perfected a water right prior to a project’s construction and may receive water from a Reclamation project under a separate delivery contract.

related to water storage arguably may indicate that Congress intended to protect the states' ability to administer water rights under state law to some degree despite the Corps' use of the water.

In Section 1 of the 1944 FCA, Congress recognized “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>58</sup> Congress included specific protection for waters in states “lying wholly or partly west of the ninety-eighth meridian”—the drier, western states.<sup>59</sup> Section 1(b) states that the use of waters in those states is authorized for navigation only if it “does not conflict with any beneficial consumptive use, present or future, in [such states], of such waters for domestic, municipal, stock water, irrigation, mining, or industrial purposes.”<sup>60</sup> In other words, the Corps is not authorized to use water for navigation in the western states, including North Dakota, if the Corps' use of the water would interfere with other beneficial uses.

As mentioned earlier, the WSA states that it does not modify Section 1 of the 1944 FCA, emphasizing that Congress was not authorizing interference with certain other uses of water at federal projects. During hearings related to the passage of the WSA, a Senate subcommittee debated that provision and the effect the legislation would have on state water rights.<sup>61</sup> One Senator, advocating for recognition of states' authority to administer water rights, explained that federal law requires that any water used in Reclamation projects be acquired through water rights assigned by the state in which the project is located, and argued that the Corps likewise should be required to comply with state water laws.<sup>62</sup> Although the final legislation did not include an explicit statement requiring the Corps to obtain state water rights for its projects, the original language was amended to remove a provision which was thought to imply that only certain water rights under state law may be protected.<sup>63</sup> The final language states that the authority provided under the WSA “shall not be construed to modify” Section 1 of the 1944 FCA or Section 8 of the Reclamation Act.<sup>64</sup>

## Conclusion

It is unclear what the Corps' obligations are with respect to state water rights for surplus water at Lake Sakakawea. On one hand, the Corps' constitutional authority to manage its projects for a variety of authorized purposes is broad; it has been delegated authority from Congress to store water for M&I purposes; and it has been authorized to charge for surplus water stored at the project. On the other hand, it may also be argued that the Corps' constitutional authority over water stored at its projects extends only to the amount of water necessary to meet the purposes of that project and not to any *surplus* water. Likewise, it may be argued that, although Congress provided statutory authorizations to the Corps related to storage and sale of water stored in a

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<sup>58</sup> 33 U.S.C. §701-1.

<sup>59</sup> 33 U.S.C. §701-1(b).

<sup>60</sup> *Id.*

<sup>61</sup> U.S. Congress, Senate Committee on the Public Works, Subcommittee on Flood Control—Rivers and Harbors, *Rivers and Harbors—Flood Control Act of 1958*, Hearing on S. 3910, 85<sup>th</sup> Cong., 2<sup>nd</sup> sess., June 4, 1958, pp. 126-35.

<sup>62</sup> *Id.* at 131.

<sup>63</sup> *See id.* at 134-35.

<sup>64</sup> 43 U.S.C. §390b(c). The WSA authorizes not only the Corps, but also Reclamation, to include storage for M&I supplies as a project purpose. Although Section 8 of the Reclamation Act would not affect the Corps' operations regarding water at its facilities, this provision appears to imply the primacy of state water rights.

Corps' project, it also indicated a certain degree of deference to state uses of the water, particularly in western states like North Dakota, when exercising that authority.

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