Corps Policy:

Natural Flows and the State Primacy of Water

By Tony Willardson

The U.S. Army Corps of Engineers is currently pursuing rulemaking intended to clarify definitions in its water supply policies and to specify the policies and methodology it will use to determine prices for surplus water contracts pursuant to section 6 of the Flood Control Act of 1944 (FCA). The Corps is also conducting a system-wide analysis of storage water reallocation in the Missouri River Mainstem Reservoir System. The Corps' efforts should recognize state authority over surface water allocation and properly interpret *stored water* and *storage capacity*.

State Primacy

Water belongs to the states, which have exclusive authority over the allocation and administration of rights to the use of surface water within their borders. State-granted water-use permits, once put to beneficial use, also become property rights with constitutional protections, including due process and compensation if taken through government action.

The basis of the states' primary and exclusive authority over their water resources is rooted in the Equal Footing Doctrine in Article IV of the U.S. Constitution, under which states take title to the navigable waters within their borders upon admission to the Union. As the U.S. Supreme Court has noted in *California v. U.S.*, 438 U.S. 645, 653-664 (1978), Congress has also demonstrated a "consistent thread of purposeful and continued deference to state water law" through such laws and provisions as the Mining Acts of 1866 and 1870, the Desert Lands Act of 1877, the Federal Water Power Act of 1920, section 8 of the Reclamation Act of 1902, and others.

Congress was well aware of this deference when it enacted the laws that govern the use of surplus water and storage at Corps' reservoirs, namely the FCA and the Water Supply Act of 1958 (WSA). For example, it specified in the first sentence of the FCA in section 1 that it is "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. . . ." 33 U.S.C. § 701-1.

Similarly, Congress specified in section 301(a) of the WSA that it is the policy of Congress to:

> [R]ecognize the primary responsibilities of the States and local interests in developing water supplies . . . 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. 43 U.S.C. § 390b.

Section 301(c) of the WSA further specifies that the law's water supply section "shall not be construed to modify the provisions" of section 1 of the FCA or the provisions of section 8 of the Reclamation Act of 1902. *Id.*

Distinguishing Storage Capacity from Stored Water

There is a difference between a reservoir's storage capacity and stored water. Stored water does not encompass all of the water in a reservoir. To the contrary, it represents the difference between water flowing into a reservoir and the water flowing out of the reservoir. Stated another way, if more water flows into the reservoir than leaves the reservoir, this water is captured as stored water. If less water flows into the reservoir than leaves the reservoir, this water supply represents the release of stored water. In either event, the natural flows that would exist absent the Corps' dams and reservoirs should not be considered stored water.

Section 6 of the FCA states that the Corps "is authorized to make contracts . . . 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 Corps' control. 33 U.S.C. § 708. The Corps has interpreted *surplus water* to mean, in part, any water in a Corps reservoir that is not required for federally authorized purposes "because the authorized use for the water never developed or the need was reduced by changes that occurred since authorization or construction." Engineer Regulation 1105-2-100, Planning Guidance Notebook at E-214 (Apr. 22, 2000). Corps officials in the Missouri River Basin have further indicated that once water reaches a reservoir, all water within the boundaries of that reservoir is subject to the Corps' authority and can be evaluated to determine whether it is surplus under the above definition, including the natural flows belonging to the states.

This interpretation ignores the distinction between storage capacity and stored water by improperly viewing the Missouri River as a series of reservoirs connected by free-flowing rivers. The more correct view is that there are reservoirs sitting on top of portions of the river. The Corps can evaluate the reservoir pool to determine

whether there is water surplus for authorized needs and uses, but the natural flowing-river volumes that run beneath the reservoir system should not be considered stored water and may be permitted by the respective states without Corps interference or contract and fee requirements.

Reasoning otherwise would be contrary to the protection of state "interests and rights in water utilization and control" provided under section 1 of the FCA, as well as requirements under section 6 that storage contracts for surplus water must not "adversely affect then existing lawful uses of such water." 33 U.S.C. §§ 701-1, 708. The states' use of natural flows was an existing lawful use prior to the act's enactment and is therefore protected.

Section 301(b) of the WSA authorizes the Corps to include storage at any planned or existing Corps reservoir for municipal and industrial water supply, provided that "State or local interests shall agree to pay for the cost of such provisions. . . ." 43 U.S.C. § 390b. While the Corps has authority under the WSA to require a contractual commitment to repay a portion of the cost of providing storage, the amount of water stored in a reservoir does not include all of the water flowing through its boundaries. Requiring a fee to access natural flows that would otherwise be available absent the Corps' facilities conflicts with the recognition of state primacy over water utilization and control found in sections 301(a) and 301(c) of the WSA. Such a requirement also runs counter to section 301(b)'s stated purpose of recouping expenses the Corps incurs in providing storage.

Conclusion

In sum, the Corps' surplus water rulemaking and storage water reallocation study should (1) be developed with robust and meaningful state participation, (2) recognize and defer to the states' primary and exclusive authority over the allocation of surface water, (3) properly distinguish between stored water and storage capacity, and (4) ensure that natural flows are not considered to be surplus or stored water.

Tony Willardson is executive director of the Western States Water Council (WSWC), representing the governors of 18 western states on water policy issues. You can reach Tony at (801) 685-2555 or twillardson@wswc.utah.gov.

This article was adapted from an August 13 letter from WSWC to Jo-Ellen Darcy, assistant secretary of the Army (Civil Works).

COMING 2014

BASESTATION3™

TAKING IRRIGATION MANAGEMENT TO THE NEXT LEVEL...AND BEYOND.

www.valleyirrigation.com/TotalControl

TOTAL CONTROL. ANYWHERE.

BaseStation3™ – the most comprehensive, state-of-the-art irrigation management solution available in the center pivot industry.

VALLEY

The Leader in Precision Irrigation