



## **Policy Statement #1 – The Army Corps Must Defer to State-Granted Water Rights**

**Policy Position:** The Corps must not encroach on States’ authority to allocate water and water rights in the Corps’ management of federal reservoir projects. The Corps’ goal should be to facilitate, not interfere with, the exercise of state-granted water rights. Therefore: (1) Any “storage accounting” methodology adopted by the Corps must credit state-allocated water to the persons with rights to the water under State law, and (2) the Corps should grant access to its properties on reasonable terms to facilitate the exercise of state-granted water rights; and any fee for this access should be limited to compensating the federal government for the marginal cost of providing access.

**Rationale:** States retain authority in our federal system to allocate water and water rights. Congress has never attempted to abrogate this fundamental State authority, even in legislation authorizing water projects to be constructed. Unless the Corps can prove a water right has been preempted, the Corps must operate such projects in a manner consistent with State-allocated water rights.

(1) “Storage accounting” is a methodology used by the Corps and, in some cases States, at many multipurpose reservoirs to determine how much water is held in storage for any specific use or user. One necessary component of any storage accounting system is a method to allocate inflow “credits” to individual uses and users. Allocations of inflow credits by the Corps must conform to State law and to State water allocation decisions. For example, water supply users may seek to use storage space provided by the Corps to store water to which they already have rights under State law. Examples include the use of Corps storage space as “terminal storage” for water conveyed to it from other sources; or the use of Corps storage space to hold “return flows” and other “made inflows” granted to the users under State law. Users who have contracted for the right to store water in a Corps reservoir should be permitted to store and retain possession of such waters in accordance with State law.

(2) In some cases, Corps projects impede, rather than facilitate, the exercise of state-granted water rights. Examples include the Upper Missouri River, which is impounded by federal projects for most of its length. These reservoirs provide substantial benefits to downstream users, but to water supply users in North and South Dakota, their main effect is to block access to natural flows that would otherwise be available to them under State law. Until recently, Corps policy prohibited such persons from crossing Corps property to access natural flows to exercise state-granted rights unless they first entered a contract with the Corps either to purchase “surplus water” or “storage services” from the Corps. These contracts are wholly inappropriate. Instead, Corps policy should ensure that rights-holders are permitted to exercise state-granted water rights without being charged for a good (water) the Corps is not authorized to sell, or for a service (storing water) they do not require. Any charge for access should be minimal, and it should be limited to the direct cost of providing easement access.

**Benefits of Policy Position:** States and local water supply interests rely on state allocated water rights in their water supply planning and operations. If water suppliers are not able to use their contracted water supply storage in Corps reservoirs to store or access their state rights to natural flows, they could be forced to build unnecessary pipelines, non-federal reservoirs, and intakes above or below the Corps reservoirs as alternatives. Building this unnecessary bypass infrastructure would result in additional environmental impacts, higher costs to water supply customers, and lower average water levels in Corps reservoirs.