



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

SUBJECT: General Accounting Office Legal Inquiry, Corps of Engineers Statutory Authorities for Recreation and Other Uses of Corps Reservoirs

This answers the questions in the letter of May 21, 1990 from the Assistant General Counsel, General Accounting Office, (GAO), to the Secretary of Defense concerning the U.S. Army Corps of Engineers authorities for recreation and other uses of Federal reservoirs administered by the Corps. GAO Counsel asked the following questions:

I. With respect to Section 4 of the Flood Control Act of 1944, and the Federal Water Project Recreation Act of 1965, sections 2, 3(a), 3(b), 4, and 5,

(a) Is recreation considered a full, limited, or incidental purpose of reservoir projects?

(b) With respect to each of these authorities, is the Corps authorized to change or maintain reservoir levels or time water releases from a reservoir for the benefit of recreation?

(c) When operating for drought conditions, what is the Corps obligation to maintain (a) reservoir elevations for recreation, and (b) access to water via boat ramps, in view of the obligation to serve other authorized purposes?

II. Does Section 1(b) of the Flood Control Act of 1944, (the O'Mahoney Millikin Amendment) apply to recreation? What is the Corps legal obligation to municipal, industrial, and irrigation water users west of the 98th meridian? How does this affect the functioning of the Missouri River System?

Mr. Feinstein of GAO Counsel staff has recently discussed these requests with Mr. Allen of my staff and informed Mr. Allen that GAO would also like advice on a question of whether the Corps of Engineers is authorized to operate its Missouri River main stem reservoirs to benefit interests on the Mississippi River that receive waters from the Missouri in its capacity as a primary tributary to the Mississippi. Moreover, Mr. Feinstein's conversations with Mr. Allen have confirmed that the general inquiries in GAO's letter include a particular interest in the Corps operation of its Missouri River main stem reservoirs for recreation and the other purposes of that reservoir system.

This document is provided for historical purposes and does not necessarily reflect the current legal position of the USACE Chief Counsel and the Army General Counsel.

Accordingly, I will first address GAO's general inquiries. With this background, I will then address the Missouri River system in order to answer GAO's particular inquiries about this system and to assist GAO in its particular interests concerning this system. To further assist GAO in its particular inquiries and interests concerning the Missouri River system, I am also enclosing with this memorandum a copy of an opinion by the Corps of Engineers Missouri River Division Counsel that I have approved on the Role of Recreation in the Regulation of the Corps of Engineers Constructed and Operated Main Stem Reservoirs of the Missouri River.

Section 4 of the Flood Control Act of 1944 authorizes the Chief of Engineers to construct, maintain, and operate public park and recreation facilities at Corps of Engineers water resources development projects and to permit the construction, maintenance, and operation of such facilities. Section 4 further specifies that the water areas at Corps reservoirs are to be open to public use without charge for recreation purposes and ready access to and exit from such water areas along the shores of such reservoirs shall be maintained for general public use when such use is determined by the Secretary of the Army not to be contrary to the public interest.

Section 4 of the Flood Control Act of 1944 is the authority for providing recreation at Corps of Engineers projects that were not authorized with recreation specified as a project purpose; particularly, those projects that were authorized prior to the enactment of the Federal Project Recreation Act in 1965. However, section 4 is also authority for the provision of recreation at projects such as the project for the Missouri River main stem reservoirs, to be presently discussed, where recreation is an authorized project purpose but no particular guidance on recreation, such as a recreation plan, was a part of the authorizing project documents.

The Federal Water Project Recreation Act was enacted in 1965 to encourage planning for and the inclusion of lands and facilities for recreation and fish and wildlife enhancement at federal water projects authorized in 1965 or to be authorized thereafter. Among other things, this 1965 Act specified nonfederal cost sharing and other items of nonfederal cooperation to be required as conditions for the inclusion of lands and facilities for recreation and fish and wildlife enhancement at the affected federal projects.

The Corps of Engineers has exercised the recreation authorities of Section 4 of the Flood Control Act of 1944 and the Federal Water Project Recreation Act, as the case may be, to provide and to permit recreation lands, public parks, and related recreation facilities at Corps reservoirs and to

encourage and regulate the use of recreation facilities and visitation at the reservoirs for recreation purposes. Moreover, it is my opinion that the Corps also has the authority, stemming from the above statutes, to manage the levels of its reservoir and time water releases, to a reasonable degree, to benefit recreation uses under normal or drought conditions.

Accordingly, the Corps of Engineers can and does provide recreation lands and facilities at its reservoirs and otherwise manages and encourages recreation use and enjoyment of its reservoirs as an important full project purpose and responsibility of those reservoirs pursuant to the provisions of either or both of the above statutes. Nonetheless, as your inquiry correctly acknowledges, it is important to note that Corps of Engineers reservoirs are authorized, constructed, operated, and used to serve multiple purposes such as flood control, navigation, and hydroelectricity in addition to purposes such as recreation, municipal and industrial water supply and on select occasions, irrigation, under sponsorship of the Bureau of Reclamation. The operation of reservoirs for multiple purposes may, of course, constrain the extent of benefits that might otherwise be available for individual purposes or beneficiaries if they could each be considered and served singly. It also follows that uses and beneficiaries of Corps multiple purposes reservoirs may each be required to share an apportionment of losses during drought.

The Corps of Engineers thus has the responsibility and broad discretion to operate its reservoirs and reservoir systems commensurate with the broad purposes for which they were authorized and are used. Recreation and the other authorized purposes of the reservoirs may somewhat constrain and compete with each other. Moreover, they may all be constrained during drought. It also does not follow that each reservoir purpose can be or need be afforded the same footing as every other purpose under all circumstances of project operation.

I understand that, to date in the history of the Corps of Engineers water resources development program, the Corps has generally not considered it necessary or advisable to justify and allocate actual storage space at Corps multiple purpose reservoirs specifically to serve recreation and for which the recreation purpose would be required to pay in one form or another. In earlier times, such an allocation of reservoir storage space specifically to serve recreation might also not even have been considered permissible. Rather, the necessary economic justifications for the reservoirs and the necessary allocations for the costs, payment, and use of their constructed storage have been premised and made entirely on

purposes such as flood control, navigation, and hydroelectricity. While not necessarily determinative, I find that it is important to understand this approach to the justification, cost allocation, and payment for the Corps multiple purpose reservoirs in order to understand the current role of recreation in the Corps operation of those reservoirs.

It appears that the Congress and the Executive have expected that the simple presence of Corps of Engineers reservoirs, that were justified and intended to be operated for uses other than recreation, would also satisfactorily provide for recreation uses without more; at a minimum, the recreation use of those reservoirs would be reasonably satisfied notwithstanding that the reservoirs, themselves, were primarily justified and would be operated for purposes other than recreation.

Changing needs and priorities and periodic drought may be challenging the current and future validity of this expectation and the passive role assumed by recreation uses in Corps of Engineers decisions for reservoir operations. Moreover, as I previously stated, it is my opinion that the Corps may manage the levels of its reservoirs, to a reasonable degree, specifically to benefit recreation uses of the reservoirs under existing authorities. Nonetheless, in further defining the degree of reservoir operation that may be undertaken in a particular instance specifically to benefit recreation uses, it should be understood that there may be very compelling legal and equitable reasons why recreation uses of Corps reservoirs largely depend on current reservoir operations for purposes other than recreation; particularly, where such other purposes have justified the reservoirs and are expected to pay for them in one form or another.

As promised, I will now address the authorities for the Corps of Engineers to operate its Missouri River main stem reservoirs for recreation and the other purposes of that reservoir system in order to answer GAO's particular inquiries about this system and to assist GAO in its particular interests concerning this system.

Project purposes of the Missouri River main stem reservoirs, as discussed hereafter, are flood control and water for irrigation, navigation, hydroelectric power, domestic and sanitary purposes, wildlife, and recreation. The main stem reservoirs were authorized in Section 9 of the Flood Control Act of 1944 as an essential part of the comprehensive plans for development of the Missouri River Basin in three authorizing documents, House Document 475 and Senate Documents 191 and 247, each of the 78th Congress.

House Document 475, 78th Congress, was the Corps of Engineers plan for development of the Missouri River Basin. Senate Document 191, 78th Congress, was the Bureau of Reclamation's plan for the same purpose. The Chief of Engineers and the Commissioner of the Bureau of Reclamation reconciled the separate Corps and Bureau plans for development of the main stem and tributaries of the Missouri River in Senate Document 247, 78th Congress. The reconciliation document, Senate Document 247, included provision for the main stem reservoirs Garrison, Oahe, Fort Randall, Big Bend, and Gavins Point "to more fully utilize the water resources of the basin and to most effectively serve the present and ultimate requirements of flood control, irrigation, navigation, hydroelectric power and other uses." The term "other uses" is defined in Senate Document 247's further discussion of the reconciled Corps-Bureau plan for the development of the entire basin that was to include "maximum benefits for flood control, irrigation, navigation, power, domestic and sanitary purposes, wildlife, and recreation."

The irrigation purpose of the Missouri River main stem reservoirs anticipated that the Bureau of Reclamation would employ waters of the reservoirs for irrigation by nonfederal interests in a program to be financially assisted and administered by the Bureau pursuant to federal reclamation law. This irrigation purpose of the reservoirs has never materialized in any significant way and should not be confused with the individually financed and administered private irrigation uses of Missouri River waters at the reservoirs or from the open river.

Section 1(b) of the Flood Control Act of 1944 is the O'Mahoney-Millikin Amendment that specifies that uses for navigation at Corps of Engineers projects of waters arising in states lying wholly or partly west of the ninety-eighth meridian shall not conflict with any beneficial consumptive use of such waters for domestic, municipal, stock water, irrigation, mining, or industrial purposes. This provision, therefore, protects beneficial consumptive uses of waters in the seventeen western states from any adverse effects on those uses when those waters are subject to navigation purposes of Corps projects. This provision is incumbent on the Corps operation of the Missouri River system for navigation to the extent that beneficial consumptive uses of Missouri River water might be affected in the upper basin states that are wholly or partly west of the ninety-eighth meridian.

I understand, for reasons to be further noted, that the Corps of Engineers complies with the requirements of the O'Mahoney-Millikin Amendment in the Missouri River Basin by regulating water for all the actual water uses of the basin, by

first making provision through the permanent pool allocations of water for the requirements of beneficial consumptive uses in the affected upper basin states. In response to GAO's inquiry concerning the O'Mahoney-Millikin Amendment and uses of water for recreation, please note that uses of water for recreation may be "beneficial" uses but they are not "consumptive" uses. Therefore, while uses of water for recreation at Corps projects or affected by Corps projects may deserve and receive a reasonable degree of management and protection together with the management and protection afforded other uses of water at or affected by Corps multiple purpose projects, uses of water for recreation in the seventeen western states are not beneficial consumptive uses to be afforded protection pursuant to the O'Mahoney-Millikin Amendment.

I understand that the Corps of Engineers has employed the authority of Section 4 of the Flood Control Act of 1944 at the Corps Missouri River main stem reservoirs to provide and to permit recreation lands, public parks, and related recreation facilities at the reservoirs and to encourage and regulate the use of recreation facilities and visitation at the reservoirs for recreation purposes. As I previously noted, this is an appropriate use of the authority of section 4 for the provision of recreation at Corps projects, such as the project for the Missouri River main stem reservoirs, where recreation is an authorized project purpose but no particular guidance, such as a recreation plan, was a part of the authorizing project documents.

The Missouri River main stem reservoir system also offers an excellent example of a circumstance where the Corps of Engineers has the responsibility and a broad discretion to operate its reservoirs and a reservoir system commensurate with the broad purposes for which they were authorized and are used. In further defining these broad parameters, the Corps Missouri River Division has advised me that the cost allocations for the storage in the Missouri River main stem reservoirs were established in 1958 to be assumed by only four purposes: Flood Control-24.72%, Irrigation-23.92%, Navigation-18.05%, and Power-33.31%. (The fact that the irrigation purpose of the reservoirs has failed to materialize has occasioned suggestions for a cost reallocation of the system that may still be under consideration but, such a reallocation has not been made.) It is also pertinent to note a portion of the 1957 Statement of the Chief of Engineers in the Joint Hearings on Missouri Basin Water problems, 85th Congress. This statement provided Congress with an outline of the Corps plans for operating the Missouri River main stem system and the rationale for the operation:

"In all of the basic long-range operation planning studies in the years since 1943 certain

general priorities were observed. Flood Control operation, of course, is not a use of water and requires only that adequate storage space will be available whenever it might be needed. ...In regulating water for all the actual water uses, provision is first made for the requirements for beneficial consumptive uses, present or future, as provided in the O'Mahoney-Millikin amendment. Downstream water requirements for domestic and municipal water supply and stream sanitation are also provided for, in accordance with the specific policy resolution unanimously adopted by the Missouri River Basin Interagency Committee at its 38th meeting on March 23, 1950. The water remaining after the requirements have been fully met is then regulated so that the outflow from Fort Randall and Gavins Point Dams adequately supplies the seasonal requirements of navigation. The entire reservoir system is then regulated internally and minor adjustments are made in the outflow from the system to provide for the generation of the maximum amount of power consistent with the previously cited uses, in accordance with the specific provisions of Senate Document No. 247...Other functions such as recreation and fish and wildlife, are also a definite factor in the operation planning, but are necessarily lower in priority."

The above guidelines confirm the Corps of Engineers adherence to the requirements of the O'Mahoney-Millikin Amendment for the protection of beneficial consumptive uses in the upper Missouri River basin states in the Corps operation of the Missouri River main stem reservoirs for navigation. In accordance with my earlier observation, it is my opinion that a reasonable degree of reservoir level management can also be undertaken specifically to benefit recreation uses of the Missouri River main stem reservoirs. Nonetheless, the above 1958 cost allocations for the storage of the reservoirs also confirms that the Corps did not consider it necessary, advisable, or at that time, perhaps, even permissible, to justify and allocate storage space at the reservoirs specifically to serve recreation. Consequently, the above operating guidelines for the Missouri River main stem reservoirs and the cost allocations that were made for their storage together confirm that reservoir levels for the recreation purpose at Corps reservoirs may nonetheless be largely dependent on determinations and management for purposes other than recreation; particularly, where such other purposes have justified the reservoirs and may be expected to pay for them in one form or another.

I noted earlier that you have also asked whether the Corps of Engineers is authorized to operate its Missouri River main stem reservoirs to benefit interests on the Mississippi River that receive waters from the Missouri in its capacity as a primary tributary to the Mississippi. The plans for the Missouri River main stem reservoirs were authorized for purposes to be served in the Missouri River basin with the expectation that their operation for those purposes would also provide important benefits for flood control and navigation on the Mississippi River. The Corps of Engineers Board of Engineers for Rivers and Harbors stated this expectation in the Board's Report on the Corps plan for development of the Missouri River basin in House Document 475, 78th Congress:

"..the proposed Missouri Basin reservoirs, operated in coordination with the authorized reservoirs in the Ohio, Arkansas, and other basins would become an important and beneficial part of the flood-control system of the lower Mississippi River. Use of the stored water for multiple purposes would also improve low-water flows in the Mississippi River thereby saving considerable dredging costs for the 9-foot navigation channel. Improvement of the low water flow would assist in providing a 12-foot depth in the Mississippi River."

I understand that the Corps of Engineers operation of the Missouri River main stem reservoir for Missouri River purposes has readily proven to provide the incidental benefits to flood control and navigation on the Mississippi river that the authorization for the Missouri River system anticipated. The Corps authority to operate those reservoirs to benefit interests on the Mississippi River remains nonetheless an incident of the Corps authority to operate those reservoirs to benefit interests on the Missouri River. Any proposition to operate the Missouri River main stem reservoirs solely to benefit Mississippi River interests would thus concern an extraordinary circumstance and considerations of extraordinary authority.

The Corps of Engineers is operating the Missouri River main stem reservoir system commensurate with the broad purposes for which the system was authorized. This operation includes a reasonable degree of authority to adjust interests to accord with changing circumstances and to respond to the exigencies of flood and drought. Nonetheless, any determination for a long term or permanent change in the operation of the system that would serve as a significant detriment to one or more of the actual purposes or the currently settled priorities of the system would, in my opinion, also suggest the need for prior congressional authorization.

The significance of a change in the operation of the Missouri River system that might require prior congressional authorization could be evident if it manifests an obvious need for a new allocation and cost sharing of reservoir storage in the system. Such a change might, of course, also manifest itself if it has a significant effect on the balance of interstate interests in the basin or perhaps, a similar effect on interstate interests in the Mississippi River. There would also be an obvious need to seek a consensus of the affected states, federal agencies, and Indian tribes for any significant changes in the operation of the Missouri River system. An interstate compact might prove to be the best prelude to the necessary federal enablement of such changes.



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