



# State of North Dakota

## Office of the State Engineer

900 EAST BOULEVARD AVE. • BISMARCK, ND 58505-0850  
701-328-2750 • FAX 701-328-3696 • <http://swc.nd.gov>

October 5, 2012

Ms. Gwyn Jarrett, Project Manager  
U.S. Army Corps of Engineers  
Omaha District CENWO-PM-A  
ATTN - Missouri River M & I Water Storage Reallocation Study  
1616 Capitol Avenue  
Omaha, NE 68102-4901

Dear Ms. Jarrett:

The purpose of this letter is to provide comments regarding the scope of the Missouri River Mainstem System Reallocation Study. There are critical clarifications that need to be addressed in the development of a scope of work for the Reallocation Study, and the Corps of Engineers (COE) needs to identify the specific legislative authority they are working within before proceeding any further. Therefore, we ask that the COE clearly address the following issues, for the benefit of all Missouri River states, in the initial draft of the scope of work for the Reallocation Study.

**1) Define storage.** Water supply storage is the capture of floodwater used to supplement natural river flows. States' water laws define storage for water supply and how it is permitted within the states. The COE does not have permits in North Dakota to capture all water flowing into the reservoirs nor do they have authority or permission to claim all water flowing into their reservoirs as stored water to be allocated by the COE for beneficial use. The COE does have the ability to store floodwater, however, storage for water supply has state permitting requirements. Illustrations are provided with this letter to further describe storage and areas that may benefit from storage contracts.

**2) Recognize natural flows.** Natural flows are Missouri River flows that would daily pass through basin states, in the absence of the COE dams. Natural river flows, both in flowing river reaches, and within the boundaries of the Missouri River reservoirs, must be recognized as property of the states to benefit their citizens. In North Dakota, the state constitution provided water flowing within the state would forever remain available to the state for use to benefit its citizens. The Flood Control Act of 1944 specifically declared the policy of 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 use and control, and to preserve and protect to the fullest extent established and potential uses of the river's waters. North Dakota opposes any assertion of the

COE that all water entering a reservoir is stored water to be allocated and controlled by the COE. The authority to quantify and allocate natural flows belongs to the states within the basin. In addition, states have the authority to allocate and permit the capture of natural flows, and through permitting, allow releases of that stored water to be put to beneficial use.

**3) Identify who repays Missouri River dam construction costs.** The COE completed a cost allocation study for the Missouri River dams in 1958, that was presented to Congress, which stated that water supply from within the natural flows would not be allocated dam construction repayment costs, and neither would flood control or navigation. The 1958 Water Supply Act stated that repayment of the entire dam construction costs in no event could exceed 50 years from when that facility first made water supply available. That time period has expired. And, there have been no modifications to the structure. (Therefore in the study to reallocate storage, there can be a review and assignment of operation and maintenance costs, however, all recovery of construction costs have been foregone. And, there are requirements for equitable distribution of costs between the authorized purposes.) The Dakota Water Resource Act of 2000, amending Section 9 of the 1944 Flood Control Act, stated that the dam construction costs were non-reimbursable for stored project water used for municipal, rural, and industrial water supply in North Dakota. The construction costs of the dams allocated to the original authorized purposes are being repaid by those authorized purposes, one example being power revenues.

**4) Define Reallocation.** There may be a distinction between allocation of costs and allocation of storage. The COE's 1958 Cost Allocation Study, presented to Congress, did state which project purposes would repay construction costs. 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. It does not appear the COE has the authority to reallocate these costs. If the COE is attempting to reallocate storage, then there must be a statement of what original water supply purpose is being reduced to allow an existing legal or authorized purpose to not be adversely affected. In defining these legal and authorized purposes, the COE must evaluate natural flows and the amendments to Section 9 of the 1944 Flood Control Act. Natural flows were an existing, and legally available water supply to the states prior to the construction of the dams. The 1986 Garrison Reformulation Act amendments to Section 9 of the 1944 Flood Control Act, provided Congressional recognition that the stored project water for diversion to North Dakota for irrigation was broadened to incorporate current and future municipal and industrial water supply developed by the state. This water supply is not available for reallocation.

Ms. Gwyn Jarrett, Project Manager  
October 5, 2012  
Page 3

Assuming the COE understands the Congressional declaration of its intent in the 1944 Flood Control Act to protect to the extent possible the states' rights to natural flows, the requirement of storage contracts for natural flows is not valid. Therefore, we urge the COE to issue pending easements without storage contracts with language in the easements that if storage contracts are determined to be required following the natural flow study, the permittee will enter into the storage contracts if they want to maintain the easement. This will resolve the current issue of the COE infringing upon states' rights to natural flows and allow water use that is well within the natural flow to move forward without storage contracts.

In addition, we respectfully request that any definition of storage and reallocation be completed in cooperation with the U.S. Bureau of Reclamation, which has involvement with dam operations and delivery of water supply to supplement natural flows within the Missouri River basin, and has practices consistent with western water law. We urge involvement of the Bureau of Reclamation as a cooperating agency.

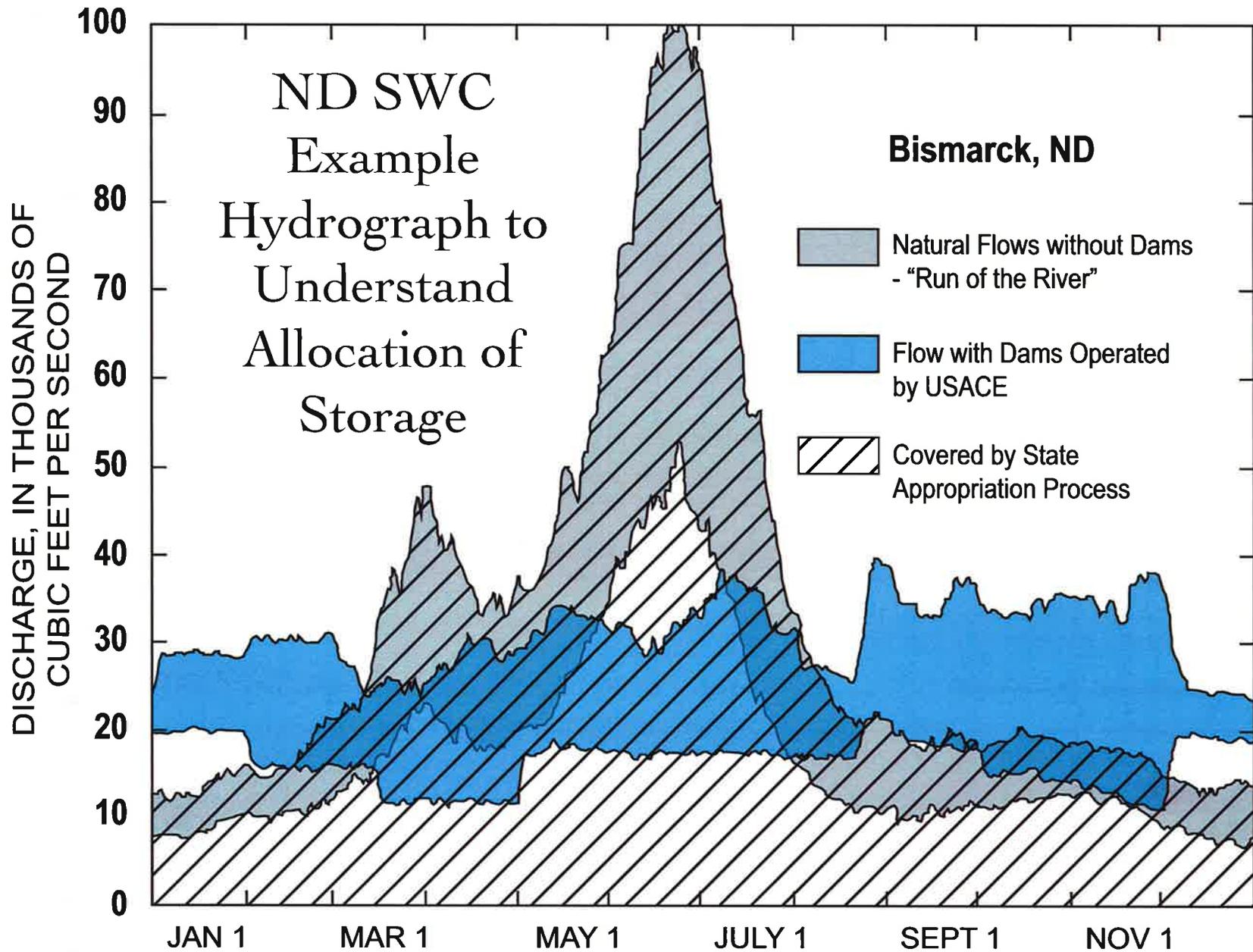
We appreciate your consideration of our comments, and hope that we have adequately outlined the importance of the COE recognizing states' authority to allocate the natural flows of the Missouri River early in the scoping process. We are also confident that your agency will take the magnitude of your decisions on how to proceed very seriously, and will ultimately recognize that your authority over storage of captured floodwaters and the states' authorities over the natural flows are not in conflict and that there is a path forward.

Sincerely,

A handwritten signature in blue ink that reads "Todd Sando". The signature is written in a cursive style with a long horizontal flourish at the end.

Todd Sando, P.E.  
North Dakota State Engineer

TS:sl/1392



DISCHARGE, IN THOUSANDS OF  
CUBIC FEET PER SECOND

ND SWC  
Example  
Hydrograph  
to  
Understand  
Allocation of  
Storage

