September 28, 2026

The Honorable Shelley Moore Capito
Chairman
Committee on Environment and
Public Works
United States Senate
410 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Sheldon Whitehouse
Ranking Member
Committee on Environment and
Public Works
United States Senate
410 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Sam Graves
Chairman
Committee on Transportation and
Infrastructure
House of Representatives
2165 Rayburn House Office Building
Washington, DC 20515

The Honorable Rick Larsen
Ranking Member
Committee on Transportation and
Infrastructure
House of Representatives
2165 Rayburn House Office Building
Washington, DC 20515

RE: Opposition to Section 120 of the Water Resources Development Act

Dear Chairman Capito, Ranking Member Whitehouse, Chairman Graves, and Ranking Member Larsen:

On behalf of North Dakota, Colorado, Montana, South Dakota, Utah, and Wyoming, we write to express opposition to Section 120 of the 2026 Water Resources Development Act passed by the U.S. House of Representatives.

Section 120 prohibits water from being diverted or exported from the Missouri River or any of its tributaries for use outside Missouri River states unless approved by <u>all</u> the governors of Colorado, Minnesota, Montana, North Dakota, South Dakota, Nebraska, Iowa, Kansas, Missouri, and Wyoming. In addition, Section 120 prohibits the Corps of Engineers from even studying the feasibility of such projects without the governors' unanimous consent.

Imposing this language onto the Missouri River states through federal law violates principles under both the state and federal constitutions and statutes, as well as upends basic tenets of established water law principles. Such a provision is certain to invite protracted litigation, as well as delay necessary infrastructure projects.

States possess primary authority over the allocation and use of water within their borders. This has been so since at least 1877 when Congress passed the Desert Land Act (43 U.S.C. § 321). The U.S. Supreme Court confirmed this view when it decided California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 164 (1935) ("it is not without significance that Congress, since the passage of the Desert Land Act, has repeatedly recognized the supremacy of state law in respect of the acquisition of water … ."). The Reclamation Act of 1902 (section 8), the Federal Power Act of 1935 (section 10), the Flood Control Act of 1944, the McCarran Amendment (1952), and the Water Supply Act of 1958 (Section 301) each expressly preserve state interests and responsibilities in the control, development, and distribution of water resources. Section 120 departs from that longstanding framework by allowing other states to dictate whether and how a state may develop or use water resources within its own borders, undermining the deference to state water law that Congress has consistently maintained.

Eight of the seventeen western states protect ownership of the state's water resources to the people of their state through their constitutions. For example, in North Dakota, "[a]ll flowing streams and natural watercourses shall forever remain the property of the state for mining, irrigating and manufacturing purposes." N.D. Const. art. XI, § 3; *see also*, Mont. Const. art. IX, §3(3) ("All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law."). These western states also protect water ownership through statutory means. Montana, for example, has a stand-alone title of code (Title 85) comprehensively governing water use within its borders, including adjudication of existing water rights, changes and new appropriations of water rights, and compacts with tribal and federal entities. Section 120 contradicts a number of these legal provisions and processes.

The protections reserved by these states through their statutes and constitutions do not require the permission of other states or the federal government. Nor should states be dictating to one another how water existing within their own state borders should be used. This encroaches into core state authority and attempts to legislatively erase sovereign state rights in violation of the Tenth Amendment of the United States Constitution.

Section 120 also implicates the Fifth Amendment of the United States Constitution, setting the stage for innumerable "takings" claims by preventing the development and use of privately held water rights.

This provision also likely violates the non-delegation and separation of powers doctrines. Congress cannot delegate its core legislative and regulatory authority to outside entities without providing principles to guide them. Section 120 would grant the 10 governors of the Missouri River states absolute veto power over an entire sector of interstate resource distribution without any standards or guiding principles.

Section 120 also grants the Missouri River governors group absolute and standardless veto power over the Corps of Engineers from even studying the feasibility of projects in a watershed that encompasses one-sixth of the continental United States. This subordinates the Corps of Engineers' statutory duties based solely on the whim of a single governor.

The Missouri River is a vital commercial and navigable waterway used heavily for barge transport and commercial transit. By codifying a rule that expressly favors the economic and commercial water interests of specific "Missouri River states" to the total exclusion of all other states, the law arguably gives a forbidden regulatory preference to the ports and waterways of one geographic region over another. This is arguably a violation of Article I, Section 9, Clause 6 of the U.S. Constitution (the Port Preference Clause).

Finally, the proposed language of Section 120 is extremely broad and not well-defined. It states that water may not be “diverted or exported from any portion of the Missouri River.” It is unclear what constitutes a diversion or export, and what constitutes a “portion of the Missouri River.” For example, Pioneer Springs Water, located in Independence, Missouri, sources its bottled water from “forty-two underground wells … directly from alluvial aquifers adjacent to the Missouri River,”[1] which it ships throughout the contiguous United States. Under Section 120, the operation of this private corporation in Missouri may now need the approval of 10 governors before it “export[s] from any portion of the Missouri River” to a state outside the Missouri River states.

For these reasons, we strongly urge you to remove Section 120 from the Water Resources Development Act as the legislation moves forward. We look forward to working with you to ensure that any final legislation respects established principles of federal and state law while supporting the long-term needs of communities throughout the Missouri River Basin and beyond. Thank you for your consideration.

Sincerely,

Kelly Armstrong
Governor of North Dakota

Jared Polis
Governor of Colorado

Greg Gianforte
Governor of Montana

Larry Rhoden
Governor of South Dakota

Spencer Cox
Governor of Utah

Mark Gordon
Governor of Wyoming

[1] https://pioneerspringwater.com/our-water/