

MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION

SFN 2053 (2/85) 5M



ROLL NUMBER

DESCRIPTION

3026

2005 HOUSE NATURAL RESOURCES

HCR 3026

2005 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. **HCR 3026**

House Natural Resources Committee

Conference Committee

Hearing Date **February 11, 2005**

Tape Number	Side A	Side B	Meter #
2	x		0-1489
Committee Clerk Signature <i>Karen Bonnet</i>			

Minutes:

Chr. Jon O. Nelson: I will open the hearing on HCR 3026 and ask the clerk to call the roll. All members present. Will the clerk read the title of the bill out loud.

Rep. David Drovdal: As one of the co-sponsors, I would say that pretty much everything that applied to the last hearing applies also applies to this hearing.

Chr. Jon O. Nelson: It would seem so. Is there anyone that has additional testimony that wasn't offered in the first resolution (today)?

Duaine Ash, ND Sportfishing Congress & Friends of Lake Sakakawea: (Written testimony attached)

Chr. Jon O. Nelson: Are there any questions for Mr. Ash? Seeing none, thank you for your testimony. I will continue taking supporting testimony for HCR 3026.

Dale Frink, State Engineer, Sec'y of State Water Commission: (Written testimony attached) Drought is probably the number one cause of low water levels in the Missouri River.

Navigation and the amount of water needed for it is a good second. I rate the State of Missouri as number three. Last week, the governor of South Dakota held a summit. It really points out all of the negotiations that the new master manual has drawn. The Missouri governor had said they would participate but at the last moment sent a representative from the attorney general's office. They have 6 million people, the ear of the president, some very powerful people in the Senate, and (think) they can do anything they want. It's very difficult to work with them. In trying to follow the Endangered Species Act, the Corps of Engineers wasted a million acre feet of water. They released 10,000 cfs for at least six weeks to keep the piping plover from nesting near water. It didn't go to support navigation or any downstream needs. To give you a comparison on the water used, SW Pipeline used 20 cfs to support *all* the water needs of southwest North Dakota. The drought that we're in right now, up until 2005, is no worse than the drought that we had in the 1980's. The difference is that the reservoir is 10 feet lower than it was then because management is different due to the Endangered Species Act.

Chr. Jon O. Nelson: Are there any questions for Mr. Frink? Seeing none, thank you for your testimony. Is there further testimony in support of HCR 3026?

Austin Gillette, Three Affiliated Tribes, Ft. Berthold: We stand in support of this resolution. Yesterday I was at a Senate hearing when I was asked how the lake level had affected us at Berthold. There were four communities where we had to extend our water intake systems. The level has affected us greatly. The burden of expense has been federal, state and tribal. When we look at the lake levels today at 1808 feet, and look at the benchmark of the property line today, it is approximately 40 feet lower for 200 miles. That is a lot of exposed acreage. All of this land that is exposed due to the lack of water in the reservoirs should be returned to the state that are

not within the boundaries of the reservation. Those lands that are within the boundaries of the reservation should be returned to the tribes. There is no use for the Corps of Engineers to have all this property. All they really need is a flow easement. There should be a maintained level of water in the reservoir for navigation, flood control and power generation needs.

Chr. Jon O. Nelson: Are there any questions for Mr. Gillette? Seeing none, thank you for your testimony. Is there further testimony in support of this bill?

Rep. Dawn Marie Charging: I support HCR 3026. It affects my home area of the Garrison area, Lake Sakakawea. The building of the reservoir caused great human suffering 50 years ago. I wanted to add that the Corps has and is making an effort to make tribal access to the lake possible. If it keeps going down, however, it will shut down the entire tourism recreation industry and again cause human suffering. There will be no way to get to the water. I believe the Corps has a specific responsibility for making the boat ramps accessible.

Chr. Jon O. Nelson: Are there any questions? Seeing none, thank you for your testimony. Is there further testimony in support?

David Munsch, Morton Co.: My relatives lost land near Beaver Creek. I support Mr. Gillette. I think the Corps has levees the full length of the Mississippi and I think they should put levees in the Missouri to reclaim the land and give it back to people on both sides. Then they can have their flowage. The Corps has been working on that master manual for over 15 years and we lose every time they open it up.

Chr. Jon O. Nelson: Are there any questions? Seeing none, thank you for your testimony. Is there further supporting testimony?

Clare H. Aubol, Mayor, New Town: I support this 3026, 3027, and 3019. Rep. Charging said that the building of the reservoir caused great human suffering 50 years ago. It has taken about 50 years to adjust to that suffering, and now it returns. The people have taken up new tasks, work and industries from their cattle, ranching and gardening and turned it into recreation and other activities. Rep. Solberg knows of the irrigation that has been adversely affected. It's important to the people of ND and the Lake area to know that the Legislature is concerned about it.

Chr. Jon O. Nelson: Are there any questions? Seeing none, thank you for your testimony. Is there further supporting testimony?

Carol Two Eagle: I support these resolutions. The single biggest reason for you to talk to (unintelligible) is because they say the Legislature does the work of the people. I have seen the entire Missouri and Mississippi Rivers from one end to the other. I've seen the barge traffic. They do haul a lot of gravel and cement. But not much of it is privately owned. Most is publicly owned. It is not an inexpensive process. The Indian people have gotten it in the neck every time the river has been changed. When Standing Rock ran out of water I hauled about 500 gallons of water, specifically for toilets. We have no outhouses, no wells. The most telling statement came from the children. They weren't playing, they were either hauling snow to melt, or were standing around in worried little knots. That was an eloquent statement and it's something to think about. The cost of this human (difficulty) is tremendous. I think we need to have you sign these concurrent resolutions just so that there is that stronger statement.

Chr. Jon O. Nelson: Are there any questions? Seeing none, thank you for your testimony.

Is there further supporting testimony? Is there any opposing testimony? Seeing none, I will close the hearing on HCR 3026.

Rep. Todd Porter: I move a do pass and place on the consent calendar.

Rep. Dorvan Solberg: Second.

Rep. Lyle Hanson: Question.

Chr. Jon O. Nelson: A motion has been made and seconded. Question has been called. Is there any committee discussion? I will try a **voice vote** on the motion. All those in favor signify by saying aye. Opposed. Motion carried (unanimous)

Do pass and place on the consent calendar, vote:

14-Yeas; 0-Nays; 0-Absent; CARRIER: DeKrey

Continued ✓

Date: 2/11/05
Roll Call Vote #: 1

2005 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. HR 3026 ✓

House NATURAL RESOURCES Committee

Check here for Conference Committee

Legislative Council Amendment Number :

Action Taken : Do Pass & Pl on Consent Calendar (10th order)

Motion Made By : Porter Seconded By : Asberg

Representatives	Yes	No	Representatives	Yes	No
Chairman - Rep. Jon O. Nelson	✓		Rep. Lyle Hanson	✓	
Vice Chairman - Todd Porter	✓		Rep. Bob Hunsakor	✓	
Rep. Dawn Marie Charging	✓		Rep. Scot Kelsh	✓	
Rep. Donald L. Clark	✓		Rep. Dorvan Solberg	✓	
Rep. Duane DeKrey	✓				
Rep. David Drovdal	✓				
Rep. Dennis Johnson	✓				
Rep. George J. Keiser	✓				
Rep. Mike Norland	✓				
Rep. Darrell D. Nottestad	✓				

voice vote - unanimous

Total (Yes) 14 No 0

Absent 0

Floor Assignment DeKrey ✓

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE (410)
February 11, 2005 3:25 p.m.

Module No: HR-28-2644
Carrier: DeKrey
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

HCR 3026: Natural Resources Committee (Rep. Nelson, Chairman) recommends DO PASS and BE PLACED ON THE CONSENT CALENDAR (14 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). HCR 3026 was placed on the Tenth order on the calendar.

2005 SENATE NATURAL RESOURCES

HCR 3026

2005 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HCR 3026

Senate Natural Resources Committee

Conference Committee

Hearing Date March 11, 2005

Tape Number	Side A	Side B	Meter #
1	X		0.6 - 21.5
	X		38.0 - 40.5
Committee Clerk Signature <i>Janet James</i>			

Minutes:

Senator Stanley Lyson, Chairman of the Senate Natural Resources Committee brought the committee to order.

All members of the committee were present except **Senator Ben Tollefson**

Senator Lyson opened the hearing on HCR 3026 urging the United States Army Corps of Engineers to maintain the level of Lake Sakakawea at a minimum elevation of 1, 825 feet mean sea level.

Representative Kenton Onstad of District 4 cosponsor of HCR 3026 introduced the resolution (See attached testimony).

Senator Joel Heitkamp asked about the snow fall and its effect on the levels of Lake Sakakawea.

Representative Onstad answered that the present snow pack is at 60% of normal and is not looking good for the Lake. As released in the newspaper today, the releases that are scheduled

will impact the fishing industry and this will take many years to recover. Several city's water intakes are now at risk with the lake level at 1806 feet and their intakes at 1800 feet.

Senator Lyson asked for confirmation that very little water form the Missouri River comes into the Lake but receives most of the water from the Yellowstone River and the Milk River Basin just below Ft. Peck and that basin in only 25% of normal.

Representative Onstad agreed.

Senator Lyson transferred the Chair to **Senator John Traynor** before he left to testify at another hearing.

Wayne Stenejhem, Attorney General of the State of North Dakota testified in support of HCR 3026, 3027 and 3019 as they all have to do with the operations of the Missouri River. He stated there has been a lot of litigation regarding the management of the Missouri River and he would not present all of it but distributed to the committee members a time line summary (See attached). There has been some significant victories where the smelt spawns have been saved and the master management manual was released. The other significant order was that navigation is not lawfully entitled to priority over the other uses of the river. It will be even more significant when once the Corps of Engineers understand that the navigation industry is dwindling and has never reached it's potential in comparison to the massive economic benefit of fishing and recreation in North Dakota.

Senator Traynor asked that in the resolution it states the tribes have the right to utilize the water of the Missouri River and if that is a common source of right.

Attorney General Stenejhem answered the when the river system was set up it was for the benefit of everybody as land was given up by tribes and non indian in exchange for a promise

that there would be water for municipal water supplies, irrigation, downstream flood control and the navigation industry. The courts have consistently held that the navigation industry is the priority and that is the way the corp has managed the river. Everybody is entitled to the water and the corp should be managing it fairly according to how it is described in the Flood Control Act of 1944. He further stated he had similar documents that explains of efforts for the NAWS Project to be distributed to the committee members.

Andy Mork with the BOMMM (Burleigh, Oliver, Morton, McClean, Mercer Counties) Joint Board consisting of the five counties along the Missouri River between Garrison and Bismarck, North Dakota that has been involved in supporting the activities of the river. He testified in support of HCR 3026, 3027 and 3029 as they all relate to each other and summarized the up stream and down stream history. The Pick Sloan Project was to provide flood protection but heavy rains still caused flooding down stream, so levy systems were developed for protection. Not one acre of land was given up for the project down stream but up stream over 1 million acres of land was given up for the project. The banks do not rebuild themselves any more and it is a now a very critical situation creating sand bars and deltas of silt. The solution is to finish the bank protection on the 80 miles of river, but this has been stopped so that sand bars can develop to provide habitat for the plovers. In conclusion he stated that North Dakota has a lot of problems in comparison to down stream and that we have the right to demand to keep the water up stream.

Duane Ash, (14.7) President of the North Dakota Sportsfishing Congress and Friends of Lake Sakakawea testified in support of HCR 3026 (See attached testimony).

Mike Donahue (17.6) representing the United Sportsmen of North Dakota the North Dakota Wildlife Federation testified they are in support of HCR 3026, 3027 and 3029.

Carol Two Eagle representing the Grass Roots People testified in support of HCR 3026 and further stated that the lobbyist from the Three Affiliated Tribes and all the other tribes were also in support of HCR 3026. The tribes were economically dependent on the river bottoms and lost that with the development of the reservoir and are losing again. The tribes are at the botom of the economic scale and the only thing lower are the animals, birds and fish who will suffer due to the low water levels. She further told of her personal story of hauling water onto the reservation during the last low water level episode.

Senator Traynor asked for opposing testimony and hearing non closed the hearing on SCR 3026.

Tape #1, Side B, 38.0 - 40.5

Senator Stanley Lyson opened the committee work on HCR 3026.

Senator Joel Heitkamp made a motion for a Do Pass of HCR 3016.

Senator Rich Wardner second the motion.

Senator John Traynor commented that resolutions seem to carry more weight if they are sent by certified mail requiring a signature.

Discussion was held by the committee if this should be amended into the resolution or if it should just be at the discretion of the chairman. It was also mentioned that from past experience, the resolution are never seriously considered anyway and not to bother with the certified mail and just send as is.

Page 5
Senate Natural Resources Committee
Bill/Resolution Number HCR 3026
Hearing Date 3-11-05

Roll call vote of HCR 3016 for a Do Pass as taken indicating 6 YEAS, 0 NAYS AND 1
ABSENT.

Senator Lyson will carry HCR 3026.

Date: 3-11-05
Roll Call Vote #: 1

2005 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 3026

Senate Senate Natural Resources Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Pass

Motion Made By Heitkamp Seconded By Wardner

Senators	Yes	No	Senators	Yes	No
Senator Stanley Lyson, Chairman	✓		Senator Joel Heitkamp	✓	
Senator Ben Tollefson, Vice Chair			Senator Michael Every	✓	
Senator Layton Freborg	✓				
Senator Rich Wardner	✓				
Senator John Traynor	✓				

Total (Yes) 6 No 0

Absent 1

Floor Assignment Lyson

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE (410)
March 11, 2005 12:17 p.m.

Module No: SR-45-4749
Carrier: Lyson
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

HCR 3026: Natural Resources Committee (Sen. Lyson, Chairman) recommends DO PASS (6 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). HCR 3026 was placed on the Fourteenth order on the calendar.

2005 TESTIMONY

HCR 3026

By: Dale Frink
Re: HCR 3026

TESTIMONY ON HOUSE CONCURRENT RESOLUTION 3026

2/11/05

House Natural Resources Committee

Dale L. Frink, State Engineer
State Water Commission
February 11, 2005

Mr. Chairman and Members of the House Natural Resources Committee, I am Dale Frink, State Engineer and also Secretary and Chief Engineer to the State Water Commission. I am appearing in support of House Concurrent Resolution 3026.

The current level of Lake Sakakawea is 1808.5 feet above mean sea level. The volume of water stored in all six of the Missouri River mainstem dams is 35.2 million acre-feet (MAF). Under the old Missouri River Master Manual that was in place until this year, navigation would have been supported until the system storage fell to approximately 18.5 MAF. This corresponds to a Lake Sakakawea elevation of approximately 1775 feet msl. The new Master Manual sets a navigation preclude of 31 MAF and corresponds to a Lake Sakakawea level of 1792 msl. If total system storage is less than this preclude on March 15, there will be no navigation that year. To maintain Lake Sakakawea at a minimum elevation of 1825 feet msl would require a navigation preclude of approximately 46 MAF. While this is a commendable goal, it should be recognized that the upper basin states were not successful in obtaining a navigation preclude of 40 MAF for the new Master Manual. Nevertheless, it makes sense for the state legislature to recommend an optimum minimum level for Lake Sakakawea.

I recommend a do pass on Senate Concurrent Resolution 3026. Thank you.

By: Duaine Ash
Re: HCR 3026
3/11/05

**Testimony of Duaine Ash, President, North Dakota Sportfishing
Congress and Friends of Lake Sakakawea**

LOBBYIST # 383

Presented to the House of Representatives Natural Resources Committee

ON

HCR 3026

February 11, 2005

Mr. Chairman and member of the committee:

Thank you for the opportunity to speak in support of House Concurrent Resolution 3026. My name is Duaine Ash. I am president of the North Dakota Sportfishing Congress and the Friends of Lake Sakakawea.

The organizations I represent are extremely concerned with the dramatic crash in Lake Sakakawea water levels in recent years. Obviously, the current drought in the watershed above Lake Sakakawea is the primary factor causing the rapidly declining water levels. However, we believe the US Army Corps of Engineers has not given fair consideration to upstream needs for water in their management of the Missouri River System.

Modeling and other analysis done by the North Dakota Department of Health and the North Dakota Game and Fish Department tells us that the coldwater habitat necessary to maintain chinook salmon and the rainbow smelt forage base in Lake Sakakawea starts to become critical at elevation 1825 feet msl. A study by Dr. Steve Schultz of NDSU determined the total annual economic value of Lake Sakakawea's salmon and walleye fisheries to North Dakota is almost \$40 million per year. As the water levels fall below 1825 feet msl, the local and state economies that depend on those fisheries will see major declines in excess of \$11 million per year. These losses do not take into consideration other economic losses related to fishing for other species or other water based recreation and tourism. We have clearly seen the economic impacts predicted by Dr. Schultz as the reservoir has fallen below 1825 feet msl.

We support House Concurrent Resolution 3026 because we feel it is appropriate and necessary for the State of North Dakota to seek a change in the way the Corps of Engineers has been managing the Missouri River System.



Wayne Stenehjem
ATTORNEY GENERAL

STATE OF NORTH DAKOTA
OFFICE OF ATTORNEY GENERAL

STATE CAPITOL
600 E BOULEVARD AVE DEPT 125
BISMARCK, ND 58505-0040
(701) 328-2210 FAX (701) 328-2226
www.ag.state.nd.us

By: Wayne Stenehjem
Re: HCR 3026
3/11/05
submitted for the record
not reread w. this
bill hearing.

February 11, 2005

Missouri River Litigation Chronology – A Summary

1944: The 1944 Flood Control Act authorizes Missouri River dams.

1967: The dams become fully operational.

1979: The Corps adopts a Master Manual to implement the Flood Control Act and to guide management of the System.

1987 – 1993: The Missouri River Basin experiences its first major drought since the dams became fully operational.

1989: The Corps recognizes that its operations are contrary to the basin's current needs and begins studying revisions to the 1979 Master Manual.

1990: North Dakota, South Dakota, and Montana jointly sue the Corps, seeking temporary reductions in releases from the dams to protect the smelt spawn. (The smelt is the primary food source for the walleye.) On May 11th the U.S. District Court for North Dakota issues an injunction stopping the Corps from releasing water until June 1st. The Corps appeals to the Eighth Circuit Court of Appeals, which promptly overturns the district court's order. That court later dismisses the states' lawsuit as moot because the spring smelt spawn is over. The merits of the states' claims are never reached.

1991: North Dakota, South Dakota, and Montana again jointly sue the Corps. The suit, which is filed in the U.S. District Court for Montana, asserts that the 1979 Master Manual and the Corps' operation of the dams is contrary to the 1944 Flood Control Act. The states allege that the Corps must treat fish, wildlife, and recreation equally with other System purposes. During the lawsuit, the Corps agrees that all uses are entitled to equal consideration. The court dismisses the lawsuit based on the Corps' assurances that it will give all water uses equal consideration while the Master Manual is being revised.

1990s: The drought breaks in 1994. Because there is sufficient water for all uses litigation abates. The full reservoirs, however, remove any urgency to revise the 1979 Master Manual. The Corps' revision process moves slowly.

2000: The present drought takes hold.

2002: South Dakota, to protect Lake Oahe's smelt spawn, sues the Corps in the U.S. District Court for South Dakota. On May 10th the court enjoins the Corps from lowering the lake until May 23rd. The Corps responds by increasing releases from Lake Sakakawea and Ft. Peck.

2002: North Dakota sues the Corps in U.S. District Court for North Dakota and obtains an injunction preventing the Corps from temporarily lowering Lake Sakakawea. The injunction saves Lake Sakakawea's 2002 smelt spawn. The suit also seeks an order requiring the Corps to properly apply the 1944 Flood Control Act and to promptly issue a new Master Manual.

2002: Montana sues the Corps in the U.S. District Court for Montana. After obtaining some temporary relief, Montana dismisses its suit and, for the most part, removes itself from further litigation.

2002: Nebraska sues the Corps in the U.S. District Court for Nebraska and obtains an injunction requiring the Corps to operate the System to maintain minimum navigation flows. North Dakota later intervenes in this suit to protect the state's interests before the Nebraska District Court

2002: The Corps appeals the three district court injunctions to the Eighth Circuit Court of Appeals.

2003: American Rivers and other environmental organizations sue the Corps in the U.S. District Court for the District of Columbia. They assert that the Corps' river management violates the Endangered Species Act and 1944 Flood Control Act.

2003: North Dakota authors an amicus brief joined by South Dakota and Montana opposing the Corps' motion to transfer the American Rivers lawsuit to Nebraska. The motion is denied. North Dakota later intervenes in the American Rivers lawsuit to protect its interests before the U.S. District Court for the District of Columbia.

2003: North Dakota supports American Rivers' request for an injunction against the Corps. The District of Columbia Court grants the injunction. The Corps and downstream states and interests appeal to the District of Columbia Court of Appeals, but the appellants later dismiss their appeals.

2003: The Corps' 2002 appeals to the Eighth Circuit Court of Appeals, however, remain pending and the Eighth Circuit holds oral argument on them.

2003: North Dakota serves the Corps with a Notice of Violation informing the Corps that drawing down Lake Sakakawea will violate the state's water quality standards and destroy the coldwater fishery, on which the walleye and salmon depend. North Dakota later sues the Corps in the U.S. District Court for North Dakota. This suit differs from the 2002 suit. The 2003 suit asserts that the Corps will violate the federal

Clean Water Act by drawing down Lake Sakakawea and jeopardizing its coldwater habitat. The suit also seeks and obtains an injunction to protect the spring smelt spawn. The injunction saves Lake Sakakawea's 2003 spawn.

2003: Blaske Marine and other downstream interests sue the federal government and upstream states in the U.S. District Court for Nebraska. Among other claims, they assert that the states and the government violate the Endangered Species Act by stocking walleye, which, Blaske Marine asserts, compete with the endangered pallid sturgeon. The state responds and defends the suit.

2003: Nebraska files a motion asking the Judicial Panel on Multidistrict Litigation to consolidate all pending Missouri River cases before the Nebraska District Court. The Corps and other downstream interests support the motion. North Dakota and other parties oppose it. North Dakota later appears before Judicial Panel on Multidistrict Litigation to argue that if the cases are to be consolidated, then the Minnesota District Court would be the most appropriate court. The Panel orders all Missouri River cases consolidated before Judge Paul Magnuson of the U.S. District Court for Minnesota.

2003: The Eighth Circuit Court of Appeals issues a decision on the three injunctions issued in 2002. It overturns injunctions issued by the North Dakota and South Dakota District Courts and affirms the one issued by the Nebraska District Court. Its opinion contains comments that could be construed as ruling that the Flood Control Act gives navigation priority over recreation.

2003: North Dakota authors a petition for certiorari that is joined by South Dakota. The petition asks the United States Supreme Court to review the Eighth Circuit Court of Appeals' decision.

2003-2004: Dozens of motions are filed in the underlying cases with Judge Magnuson.

2004: The Corps and downstream states and interests file oppositions to North Dakota's petition for certiorari. In April, the U.S. Supreme Court denies North Dakota's petition and declines to review the Eighth Circuit's decision.

2004: In February, Judge Magnuson grants North Dakota's motion and orders the Corps to issue a new Missouri River Manual, which the Corps does in March. Judge Magnuson later holds a hearing on the many motions pending in the consolidated cases.

2004: In April, Judge Magnuson dismisses North Dakota's 2003 suit against the Corps in which the state asserted that drawing down Lake Sakakawea violates the Clean Water Act. The judge rules that the Corps is not subject to North Dakota's

water quality standards. North Dakota later appeals the decision to the Eighth Circuit Court of Appeals.

2004: In June, Judge Magnuson issues his decision on all remaining issues. He dismisses Blaske Marine's claim that North Dakota's walleye stocking violates the Endangered Species Act. He rules that the Flood Control Act does not give navigation a priority over recreation, but that the Corps has a duty to even-handedly balance all river uses and that in doing so it has considerable discretion. He also dismisses American Rivers' environmental claims. Downstream interests view the decision as a loss and appeal to with the Eighth Circuit Court of Appeals. American Rivers also appeals.

2004-2005: Briefs are filed with the Eighth Circuit. Thus far, about 20 briefs have been filed. The final batch, which is due in a couple of weeks, will include another six briefs. The Court of Appeals will hold oral argument on the appeals in mid-April.

Chairman Lyson and Members of the Senate Natural Resources Committee

I am Representative Kenton Onstad, District 4, Parshall. I stand here in support of HCR 3026.

HCR 3026 addresses water issues on Lake Sakakawea and the Missouri River. It is important to continue to be on record in support of maintaining the level of water that is adequate to maintain services and the fishing industry on Lake Sakakawea.

1825 feet is significant. At that level we are able to fully utilize all of the boat ramps, irrigation systems and municipal water systems that are now dependent on Lake Sakakawea.

1825 feet is also significant with Sales Tax Collections. At that level and above you see no increase, but it is very well documented by the Garrison City Council as the lake has dropped below 1825 the collections is almost directly proportional to the lake level.

Members of the Senate Natural Resources Committee I urge your support of HCR 3026



Wayne Stenehjem
ATTORNEY GENERAL

STATE OF NORTH DAKOTA
OFFICE OF ATTORNEY GENERAL

STATE CAPITOL
600 E BOULEVARD AVE DEPT 125
BISMARCK, ND 58505-0040
(701) 328-2210 FAX (701) 328-2226
www.ag.state.nd.us

March 11, 2005

Missouri River Litigation Chronology – A Summary

1944: The 1944 Flood Control Act authorizes Missouri River dams.

1967: The dams become fully operational.

1979: The Corps adopts a Master Manual to implement the Flood Control Act and to guide management of the System.

1987 – 1993: The Missouri River Basin experiences its first major drought since the dams became fully operational.

1989: The Corps recognizes that its operations are contrary to the basin's current needs and begins studying revisions to the 1979 Master Manual.

1990: North Dakota, South Dakota, and Montana jointly sue the Corps, seeking temporary reductions in releases from the dams to protect the smelt spawn. (The smelt is the primary food source for the walleye.) On May 11th the U.S. District Court for North Dakota issues an injunction stopping the Corps from releasing water until June 1st. The Corps appeals to the Eighth Circuit Court of Appeals, which promptly overturns the district court's order. That court later dismisses the states' lawsuit as moot because the spring smelt spawn is over. The merits of the states' claims are never reached.

1991: North Dakota, South Dakota, and Montana again jointly sue the Corps. The suit, which is filed in the U.S. District Court for Montana, asserts that the 1979 Master Manual and the Corps' operation of the dams is contrary to the 1944 Flood Control Act. The states allege that the Corps must treat fish, wildlife, and recreation equally with other System purposes. During the lawsuit, the Corps agrees that all uses are entitled to equal consideration. The court dismisses the lawsuit based on the Corps' assurances that it will give all water uses equal consideration while the Master Manual is being revised.

1990s: The drought breaks in 1994. Because there is sufficient water for all uses litigation abates. The full reservoirs, however, remove any urgency to revise the 1979 Master Manual. The Corps' revision process moves slowly.

2000: The present drought takes hold.

2002: South Dakota, to protect Lake Oahe's smelt spawn, sues the Corps in the U.S. District Court for South Dakota. On May 10th the court enjoins the Corps from lowering the lake until May 23rd. The Corps responds by increasing releases from Lake Sakakawea and Ft. Peck.

2002: North Dakota sues the Corps in U.S. District Court for North Dakota and obtains an injunction preventing the Corps from temporarily lowering Lake Sakakawea. The injunction saves Lake Sakakawea's 2002 smelt spawn. The suit also seeks an order requiring the Corps to properly apply the 1944 Flood Control Act and to promptly issue a new Master Manual.

2002: Montana sues the Corps in the U.S. District Court for Montana. After obtaining some temporary relief, Montana dismisses its suit and, for the most part, removes itself from further litigation.

2002: Nebraska sues the Corps in the U.S. District Court for Nebraska and obtains an injunction requiring the Corps to operate the System to maintain minimum navigation flows. North Dakota later intervenes in this suit to protect the state's interests before the Nebraska District Court

2002: The Corps appeals the three district court injunctions to the Eighth Circuit Court of Appeals.

2003: American Rivers and other environmental organizations sue the Corps in the U.S. District Court for the District of Columbia. They assert that the Corps' river management violates the Endangered Species Act and 1944 Flood Control Act.

2003: North Dakota authors an amicus brief joined by South Dakota and Montana opposing the Corps' motion to transfer the American Rivers lawsuit to Nebraska. The motion is denied. North Dakota later intervenes in the American Rivers lawsuit to protect its interests before the U.S. District Court for the District of Columbia.

2003: North Dakota supports American Rivers' request for an injunction against the Corps. The District of Columbia Court grants the injunction. The Corps and downstream states and interests appeal to the District of Columbia Court of Appeals, but the appellants later dismiss their appeals.

2003: The Corps' 2002 appeals to the Eighth Circuit Court of Appeals, however, remain pending and the Eighth Circuit holds oral argument on them.

2003: North Dakota serves the Corps with a Notice of Violation informing the Corps that drawing down Lake Sakakawea will violate the state's water quality standards and destroy the coldwater fishery, on which the walleye and salmon depend. North Dakota later sues the Corps in the U.S. District Court for North Dakota. This suit differs from the 2002 suit. The 2003 suit asserts that the Corps will violate the federal

Clean Water Act by drawing down Lake Sakakawea and jeopardizing its coldwater habitat. The suit also seeks and obtains an injunction to protect the spring smelt spawn. The injunction saves Lake Sakakawea's 2003 spawn.

2003: Blaske Marine and other downstream interests sue the federal government and upstream states in the U.S. District Court for Nebraska. Among other claims, they assert that the states and the government violate the Endangered Species Act by stocking walleye, which, Blaske Marine asserts, compete with the endangered pallid sturgeon. The state responds and defends the suit.

2003: Nebraska files a motion asking the Judicial Panel on Multidistrict Litigation to consolidate all pending Missouri River cases before the Nebraska District Court. The Corps and other downstream interests support the motion. North Dakota and other parties oppose it. North Dakota later appears before Judicial Panel on Multidistrict Litigation to argue that if the cases are to be consolidated, then the Minnesota District Court would be the most appropriate court. The Panel orders all Missouri River cases consolidated before Judge Paul Magnuson of the U.S. District Court for Minnesota.

2003: The Eighth Circuit Court of Appeals issues a decision on the three injunctions issued in 2002. It overturns injunctions issued by the North Dakota and South Dakota District Courts and affirms the one issued by the Nebraska District Court. Its opinion contains comments that could be construed as ruling that the Flood Control Act gives navigation priority over recreation.

2003: North Dakota authors a petition for certiorari that is joined by South Dakota. The petition asks the United States Supreme Court to review the Eighth Circuit Court of Appeals' decision.

2003-2004: Dozens of motions are filed in the underlying cases with Judge Magnuson.

2004: The Corps and downstream states and interests file oppositions to North Dakota's petition for certiorari. In April, the U.S. Supreme Court denies North Dakota's petition and declines to review the Eighth Circuit's decision.

2004: In February, Judge Magnuson grants North Dakota's motion and orders the Corps to issue a new Missouri River Manual, which the Corps does in March. Judge Magnuson later holds a hearing on the many motions pending in the consolidated cases.

2004: In April, Judge Magnuson dismisses North Dakota's 2003 suit against the Corps in which the state asserted that drawing down Lake Sakakawea violates the Clean Water Act. The judge rules that the Corps is not subject to North Dakota's

water quality standards. North Dakota later appeals the decision to the Eighth Circuit Court of Appeals.

2004: In June, Judge Magnuson issues his decision on all remaining issues. He dismisses Blaske Marine's claim that North Dakota's walleye stocking violates the Endangered Species Act. He rules that the Flood Control Act does not give navigation a priority over recreation, but that the Corps has a duty to even-handedly balance all river uses and that in doing so it has considerable discretion. He also dismisses American Rivers' environmental claims. Downstream interests view the decision as a loss and appeal to with the Eighth Circuit Court of Appeals. American Rivers also appeals.

2004-2005: Briefs are filed with the Eighth Circuit. Thus far, about 20 briefs have been filed. The final batch, which is due in a couple of weeks, will include another six briefs. The Court of Appeals will hold oral argument on the appeals in mid-April.

**Testimony of Duaine Ash, President, North Dakota Sportfishing
Congress and Friends of Lake Sakakawea**

LOBBYIST # 383

Presented to the Senate Natural Resources Committee

ON

HCR 3026
March 11, 2005

Mr. Chairman and member of the committee:

Thank you for the opportunity to speak in support of House Concurrent Resolution 3026. My name is Duaine Ash. I am president of the North Dakota Sportfishing Congress and the Friends of Lake Sakakawea.

The organizations I represent are extremely concerned with the dramatic crash in Lake Sakakawea water levels in recent years. Obviously, the current drought in the watershed above Lake Sakakawea is the primary factor causing the rapidly declining water levels. However, we believe the US Army Corps of Engineers has not given fair consideration to upstream needs for water in their management of the Missouri River System.

Modeling and other analysis done by the North Dakota Department of Health and the North Dakota Game and Fish Department tells us that the coldwater habitat necessary to maintain chinook salmon and the rainbow smelt forage base in Lake Sakakawea starts to become critical at elevation 1825 feet msl. A study by Dr. Steve Schultz of NDSU determined the total annual economic value of Lake Sakakawea's salmon and walleye fisheries to North Dakota is almost \$40 million per year. As the water levels fall below 1825 feet msl, the local and state economies that depend on those fisheries will see major declines in excess of \$11 million per year. These losses do not take into consideration other economic losses related to fishing for other species or other water based recreation and tourism. We have clearly seen the economic impacts predicted by Dr. Schultz as the reservoir has fallen below 1825 feet msl.

We support House Concurrent Resolution 3026 because we feel it is appropriate and necessary for the State of North Dakota to seek a change in the way the Corps of Engineers has been managing the Missouri River System.